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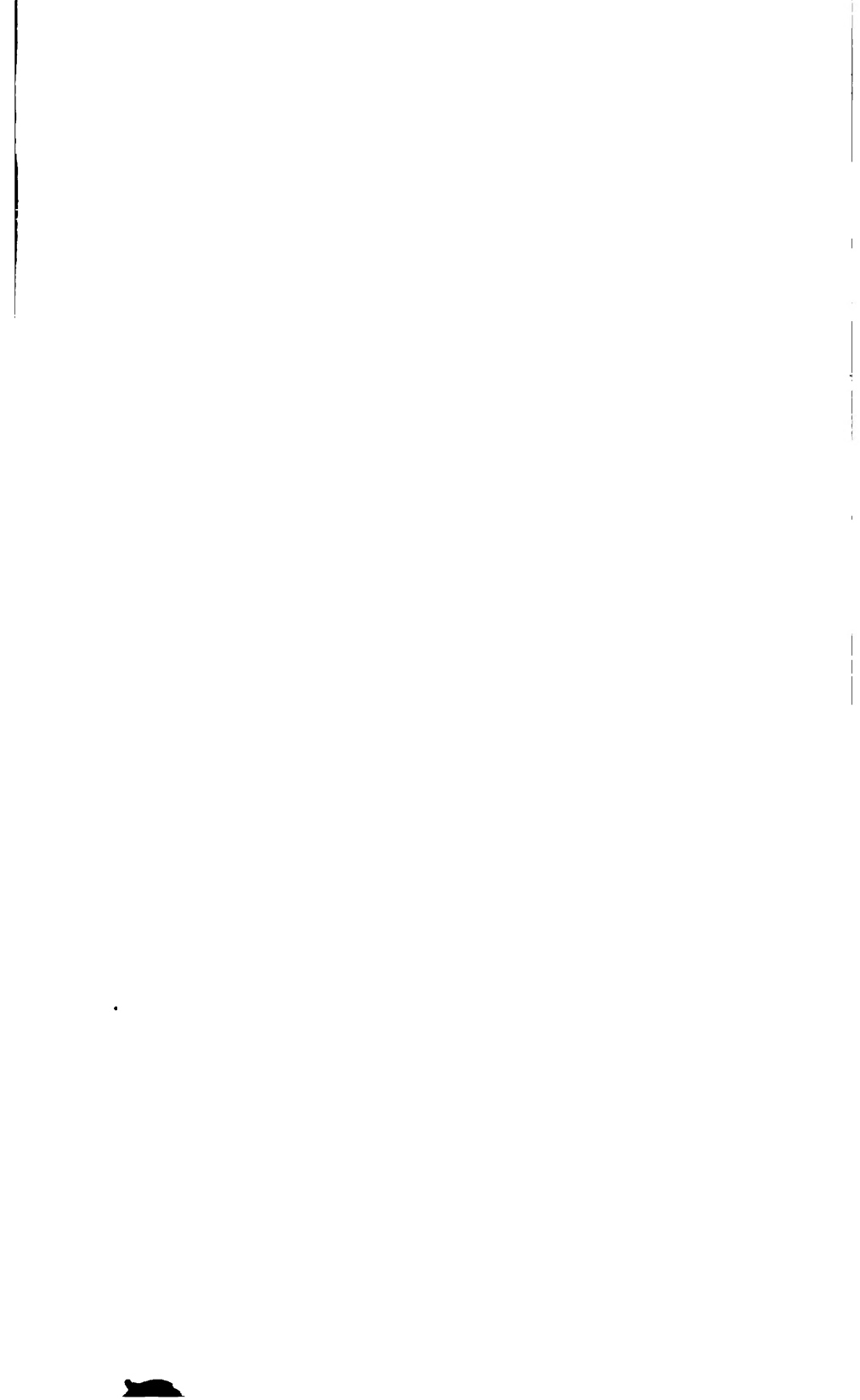
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REPORTS

OF

CASES

DECIDED IN

The High Court of Chancery,

BY

THE RIGHT HON.

SIR JOHN LEACH,

MASTER OF THE ROLLS.

BY JOHN TAMLYN,

OF GRAY'S INN, ESQ. BARRISTER AT LAW.

1829, 1830.—10 & 11 GEO. IV. & 1 WM. IV.

LONDON:

WILDKINSONS,

LAW BOOKSELLERS AND PUBLISHERS,

LINCOLN'S INN GATEWAY, CAREY STREET.

1831.

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REPORTS OF CASES

ARGUED AND DETERMINED

1829.

IN

The High Court of Chancery.

CHARLES FORDHAM and WM. FORDHAM, WESTMINSTER
HALL.
June 25.
Plaintiffs;
AND
ISAAC ROLFE and MYRINDA CODLING,
Defendants.

WILLIAM PRATT, by his will dated 5th September 1818, directed that all his just debts, and funeral and testamentary expenses, should be fully paid and satisfied out of his personal estate and effects, if the same were sufficient for that purpose; but if not, then the deficiency to be made up out of his real estate thereafter devised. And subject thereto, he gave and devised his real estate, and the deficiency to be made up out of his real estate; and subject thereto, he devised his copyhold messuages. Testator died. A creditor's bill was then filed, but neither the heir at law nor any personal representative were parties; in fact, the will had not been proved; there was no personal estate: Held, that administration *cum test. annexo* must be taken out, and that the administrator and heir at law must be parties. Bill to be so amended.

Parties.
Heir at law.
Personal representatives.

A., by will, directed his debts to be paid out of his personal

1829.

FORDHAM

v.

ROLFE.

vised unto his wife *Susannah* and her assigns, several copyhold messuages, to hold unto his said wife and her assigns for and during the term of her natural life, provided she should so long continue his widow and unmarried, and subject to the mortgages and other incumbrances thereon, with remainder to the Defendant, *Myrinda Codling*, her heirs and assigns for ever. The testator appointed his wife, *Susannah*, and Defendant, *Isaac Rolfe*, executors. The testator and his widow are both dead. This bill was filed by the Plaintiffs as the judgment creditors of *William Pratt* deceased, on behalf of themselves and his other creditors. The bill stated the preceding facts, and that the executors had not proved the will; but that the personal property being under 5*l.*, *Susannah Pratt* had exhibited the will in the court of the archdeaconry of *Sudbury*, in order to be filed and registered, and the same was filed and registered accordingly, and that the Defendant *Rolfe* had possessed some personal estate and effects of the testator. The bill prayed that an account might be taken of what was due and owing to the Plaintiff and the other creditors of the testator, and that all the debts might be paid and satisfied out of the said copyhold premises, and that the said copyhold premises might be sold for that purpose. The only Defendants were *Myrinda Codling* and *Isaac Rolfe*; the heir at law was not a party.

Mr. *Lovat* for the Plaintiffs. The testator having left no personal estate, the executors refused to prove the will, and no other person would administer. The heir at law is an infant, but not a party, nor is it necessary he should be. He submitted that the decree should be for an account of the debts, and for sale of the copyholds.

The MASTER of the ROLLS. I cannot do that. Why do you not take out administration? The account of

the personal estate must be first taken, in order to shew there is a deficiency of personal assets, and for that purpose an administration, with the will annexed, must be obtained. The heir at law must be a party. The will cannot be decreed to be well proved in his absence. Let it stand over, with leave to make the administrator and heir parties.

1829.
 FORDHAM
 v.
 ROLFE.

Note.—It is always desirable to have the will declared to have been well proved, and that can only be attained, by the heir at law being a party to the bill.

In a case of possession by the devisee for several years, Sir *Joseph Jekyll*, Master of the Rolls, is said to have decreed a sale without the heir at law being a party (*Harris v. Ingledew*, 3 P. W. 92.); and Mr. *Cox*, in a note, adds, that it appears by the register's books, that the will of the testator was declared to be well proved; but the learned Judge himself said in that very case, "that the objection of the heir at law not being a party, seemed to be a material objection; for since the sale of the estate must affect all the devisees in proportion, and as the estate would not, without the heir being a party to the decree, sell for near the value, this might be a wrong to all the devisees, and occasion more of their lands to be sold than would perhaps be otherwise necessary."

By a report in *Brown*, of the case of *Williams v. Whinyates* (3 B. C. C. 599.), where the heir at law was in the *East Indies*, it is said that the Lord Chancellor declared the will to be well proved. This, however, could not bind the heir at law, he not being a party to the suit, nor insure the title under it against his claims. In *Thompson v. Topham*, (1 Yo. & Jer. 556.) in the Exchequer, to which the heir at law was not a party, by reason of his being out of the jurisdiction, the Court merely decreed the trusts of the will to be carried into execution. Indeed, the counsel in that case did not even ask for a declaration that the will was well proved, as it would be contrary to practice, and if inserted, would not bind persons absent (*Ld. Redesdale*, 139, 140., 3d ed.); but it is not a good exception to a report of good title that the heir at law was not a party (*Wakeman v. Duchess of Rutland*, 3 Ves. jun. 232.)

The heir at law should be made defendant, and not co-plaintiff, when any deed, will, &c. is to be proved against him (*Phunket v. Joice*, 2 Sch. & Lef. 159.)

1829:

WESTMINSTER
HALL.

June 22.

Infant trustee.
Constructive
trusts.

A. contracted to sell a freehold estate to B., and by his will gave the purchase-money and the interest to become due in the mean time to trustees, for certain purposes; and if the contract should not be completed, he devised the freehold estate to the trustees upon trust, to sell the same, and apply the purchase-money to the like purposes. A. died, leaving a son, his heir at law, who died, leaving an only daughter, his heiress at law, an infant. The Court held, that she was not a trustee within the act 6 G. 4. c. 74., and dismissed a petition that the infant might be ordered to convey.

In the Matter of HENRIETTA MOODY, an Infant.

THIS was the petition of *John Davies* Esquire, the acting executor of the will of the Rev. *William Moody* deceased.

The petition set forth an order referring it to the Master to enquire, Whether *Henrietta Moody* were an infant, and a trustee of certain estates within the intent and meaning of the act of parliament passed in the sixth year of the reign of his present majesty, c. 74., and for whom?

The Master, by his Report, certified that a state of facts had been laid before him, setting forth that the Rev. *William Moody* clerk, deceased, being seised of certain freehold and leasehold hereditaments, entered into a contract in writing with *William Wyndham* Esquire for the sale, at the sum of 17,600*l.*, of certain freehold manors. That *William Moody*, by his will duly executed, reciting the said contract, gave, devised, and bequeathed unto *Edward Duke*, *John Davies*, and *Henry Moody*, thereafter appointed executors in trust of his will, the said sum of 17,600*l.*, and the interest in the mean time to become due, To hold the same unto the said *Edward Duke*, *John Davies*, and *Henry Moody*, their executors, administrators, and assigns, upon trust, to receive and apply the same in the manner therein mentioned; and in case by any unforeseen accident the said contract with the said *William Wyndham* should not be carried into full effect, and the said sum of 17,600*l.* should not be paid, and the said lands should not be

conveyed to the said *William Wyndham*, then the said testator's will and mind was, and he thereby gave, devised, and bequeathed the said freehold and leasehold messuages, lands, cottages, tenements, and hereditaments to his executors, the said *Edward Duke*, *John Davies*, and *Henry Moody* in trust, to hold to them and their heirs and assigns for ever upon trust, with all convenient speed to sell the same, and to apply the purchase-money thereof according to the same uses and trusts as were thereinbefore expressed concerning the said sum of 17,600*l.*; and the said testator appointed the said *Edward Duke*, *John Davies*, and *Henry Moody* executors in trust of his said will. That the said *William Moody* departed this life on or about the 20th day of *April* 1827, without altering or revoking his said will; and that the said *Edward Duke* renounced all his right, title, and interest in and to the probate and execution of the said will of the said *William Moody*; and that in the same year 1827, the said *John Davies* and *Henry Moody* (since deceased) duly proved the said will in the prerogative court of the Archbishop of *Canterbury*. And the said state of facts further stated, that upon the decease of the said *William Moody*, the freehold manor, messuages, cottages, lands, tenements, and hereditaments so contracted to be sold to the said *William Wyndham* as aforesaid, descended to the said *Henry Moody*, his eldest son and heir at law, subject to the devise contained in the said will of the said *William Moody*, in case the contract with the said *William Wyndham* should not be carried into effect. That the said *Henry Moody*, on or about the 4th day of *October* 1827, intermarried with *Felicia Julia Marianne Seagrave*, spinster, and that he departed this life intestate as to any real estate on or about the 23d day of *December* in the same year; that there was issue of the said marriage a posthumous daughter, (that is to say)

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the said infant, *Henrietta Moody*, who was born in the month of *July* 1828; that the said *John Davies*, therefore, submitted, that the said *Henrietta Moody* was a trustee of the legal estate of the said freehold manor, messuages, cottages, lands, tenements, and hereditaments so contracted to be sold to the said *William Wyndham* within the intent and meaning of the second section of the statute passed in the sixth year of the reign of his present Majesty, intituled "An act for consolidating and amending the laws relating to conveyances and transfers of estates and funds vested in trustees who are infants, idiots, lunatics, or trustees of unsound mind, and who cannot be compelled, or refuse to act;" and that she was such trustee for the said *William Wyndham* the purchaser. And on consideration of the said state of facts, and the evidence which had been produced and read before him in support thereof, the Master found that the said *Henrietta Moody* was an infant; but he was of opinion that she was not, under the circumstances therein stated, a trustee of the estates in the said petition and order mentioned, within the intent and meaning of the act 6 G. 4. c. 74. The petitioner submitted that the said *Henrietta Moody* was a trustee of the estates within the intent and meaning of the said act of parliament for and on behalf of the said *William Wyndham*, to whom the said estates were contracted to be sold as aforesaid; and prayed that the said *Henrietta Moody* might be directed to execute all proper and necessary conveyances of and relating to the said estates so contracted to be sold to the said *William Wyndham*, and that all proper and necessary parties might be directed to join in and execute all such conveyances, or that the said Master might be directed to review his said Report.

Mr. *Wright* for the petitioner. This is an application under the second and tenth sections of the statute 6 G. 4.

c. 74.(a) That statute repealed the stat. of 7 *Ann. c. 19.* for enabling infants to convey; and under that statute there were several cases in which the Court had directed infant trustees and mortgagees to convey the legal estate.

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(a) By the 7 *Ann. c. 19.*, after reciting that many inconveniences did and might arise, by reason that persons under the age of one and twenty years, having estates in lands, tenements, or hereditaments, only in trust for others, or by way of mortgage, could not convey any sure estate in any such lands, tenements, or hereditaments, to any other person or persons; it is enacted, that it shall be lawful for such person or persons under age, by order in Chancery or Exchequer, on petition as therein mentioned, to convey and assure any such lands, &c., as by such order should be directed, and that such conveyance should be as good as if the infant were of full age.

6 *G. 4. c. 74. s. 2.* "And be it further enacted, that when and so often as any person or persons seised or possessed of any lands, tenements, or hereditaments, or other property, or any estate or interest therein, upon any trust or trusts, or by way of mortgage, shall be under the age of twenty-one years, it shall be lawful for such infant or infants, by the direction of the Court of Chancery or Exchequer [or some provincial Courts therein mentioned], to convey, release, surrender, assign, or otherwise assure such lands, tenements, or hereditaments, or property or estate, or interest therein, to such person or persons, and in such manner as the said courts respectively shall think proper and direct; and every such conveyance, release, surrender, assignment, or assurance shall be as valid and effectual, to all intents and purposes, as if the said person or persons, being an infant or infants, were at the time of executing the same of the full age of twenty-one years."

Sect. 10. "And be it further enacted, that the several provisions hereinbefore contained shall extend and be construed to extend to cases in which a trustee or trustees may have some beneficial estate or interest in the lands, tenements, hereditaments, property, stocks, funds, annuities, or securities vested in him, her, or them as aforesaid, and also to cases in which the trustee or trustees may have some duty or duties to perform, so as to enable conveyances and other conveyances and transfers to be made, in order to vest any lands, tenements, hereditaments, property, stocks, funds, annuities, or securities in a new trustee or trustees, duly appointed in the place of such trustee or trustees, by virtue of some power or authority, or by the Court of Chancery or Exchequer, either alone or jointly with any continuing trustee or trustees (as the case may require)."

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In the case of *Holesworth v. Lane* (a), a reference had been made to the Master to enquire whether the heir of a mortgagee came within the act of *Anne*, and the Master reported in the affirmative; and, thereupon, an order was made that the heir should assign over the mortgage to such persons as the executor should appoint; whereupon a motion was made on the part of the Defendant to set aside the report, alleging that the heir was not a trustee for the executor within the meaning of that act, for the heir of the mortgagee was a trustee for his executor only by implication of law, but it was argued on the other hand, that implied trusts were within the act; and the case of *Bertie v. Vernon* was relied upon, in which Lord Chancellor King (b) decided that the heir of a vendee was a trustee within the act of *Anne* for a person who had paid the purchase-money; and in this case of

We have brought together the sections of the respective acts of *Anne* and his present Majesty, in order that it may be seen how far they differ, and to facilitate the means of judging to what extent the decisions on the repealed law control or explain the substituted enactments. In our humble opinion, the second section of the act of his present majesty is to the same effect as the repealed act, except that it does not repeat the mode of proceeding to be by petition, which, however, is provided for in the eighth section; and if we are correct in this opinion, the decisions on the latter apply strictly to the former. It remains, then, to be seen, whether the tenth section enlarges it; and as to that, we conceive it has no influence upon constructive trusts, but simply effects this, that where there is an express trust, it shall come within the jurisdiction given by the act, in cases in which the infant trustee is beneficially interested, and in cases in which he has a duty to perform, so as to enable conveyances to be made in order to vest property in new trustees.

(a) *Mosely's Rep.* 197.

(b) 2 *P. Wms.* 549. The Lord Chancellor King, in the case *Ex parte Vernon*, said, that where there was no declaration of trust in writing, he should, for the future, leave the *cestui que trust* to bring his bill, and have a decree against the infant to convey, because these orders for an infant trustee to convey ought to be in the plainest cases, and not in such as are subject to the disputes which trusts without writing might be liable to.

Holesworth v. Lane it was held, that the heir was trustee for the executor, and that the very inconvenience the statute was made to remedy was that the parties should not be obliged to wait the full age of the heir. In the cases of *Attorney-General v. Pomfret* (a), and *Ex parte Bellamy* (b), infants were directed to convey. In *Goodwin v. Lister* (c), the Lord Chancellor *Talbot* held, there could be no doubt of the construction of the act with regard to express trusts by deed; and that an infant being a mere trustee might be ordered to convey, for there was no inconvenience in directing an infant to part with an estate which was of no benefit to him. (d)

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In the cases of — *v. Hancock* (e) before Lord *Eldon*, and *Ex parte Marshall* at the Rolls in 1797 (f), and in a former case by Lord *Thurlow* (g), infant heirs at law of mortgagees were held to be trustees under the statute of *Anne*. The objection in the case of *Ex parte Chastaney* (h), was remedied by the late act 6 G. 4. c. 74.

Mr. *Jacob* for the purchaser, was disposed to consent to the petition, if his Honour thought the purchaser would be safe in taking a conveyance from the infant; but in *Dew v. Clarke* (i), the Lord Chancellor was understood to be of opinion, that the act 6 G. 4. c. 74. did not apply to cases of constructive trusts; and in the case of *King v. Turner* (k), lately heard before the Vice-Chancel-

(a) 2 Cox, 321.

(b) 2 Cox, 422.

(c) 5 P. W. 387.

(d) That learned Lord added, that he did not think constructive trusts to be within the view of that act of parliament.

(e) 17 Ves. 383.

(f) 17 Ves. 383. 2d ed., note.

(g) 17 Ves. 383. 2d ed., note.

(h) *Jacob*, 56.

(i) This was a case under the fifth section of the act 6 G. 4. c. 74.

(k) We cannot find this case of *King v. Turner* in any of the reports, and shall present the reader with a note of the case, with which we have been supplied.

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lor, where a person had covenanted to surrender a copyhold to trustees for his creditors, he died without having surrendered; and the question was, whether the infant

Joseph Green, being seised in fee of a copyhold, died intestate, leaving *Mary Green* his widow, and *George Green* his customary heir. *Mary Green* was admitted to her free bench. By indenture dated 20th June 1814, *Mary Green* and *George Green* covenanted with certain trustees, that he, *George Green*, would be admitted tenant, and that immediately afterwards the said *George Green* and *Mary Green* would surrender the premises unto the trustees, their heirs, and assigns, or to such person as they should direct, upon trust, that the trustees should sell the same, pay 700*l.* unto *Mary Green* for her life-interest, and divide the residue amongst the creditors.

The said *George Green* made his will, dated 8th May 1818, in the following words: — “Whereas, being entitled to the copyhold messuage, farm, and land called the *Hoe Land* and *Hoe Green*, upon which I now reside, subject to the life-interest therein of my mother, I some time ago covenanted to surrender the same to trustees for the benefit of my creditors, on the condition that the sum of 700*l.* was to be secured to me by the bond of the trustees therein mentioned, the interest whereof, during my mother’s life, was to be paid to her, I give and devise all the said copyhold, messuage, farm, and land, with the appurtenances, called *Hoe Land* and *Hoe Green*, unto my friend *John Saller*, his heirs and assigns, upon trust; and I declare and direct, that it shall and may be lawful to and for the said *John Saller*, his heirs and assigns, for the purpose of carrying my said contract into effect, at the request, costs, and charges of the said trustees, to enter into and execute all necessary contracts, agreements, appointments, surrenders, and assignments of the same premises to them, the said trustees, or as they shall direct; and to take and accept, in the joint names of himself and *Peter Martin*, the security of the said trustees for the sum of 700*l.* and interest;” and he disposed of the said sum and the residue of his real and personal estate upon the trusts therein mentioned. *George Green*, shortly after the date of his will, died without having been admitted tenant to the copyhold premises in question, leaving *Jane Watts Green*, an infant, his customary heir, and his will has since been duly proved. *John Saller* duly made and published his last will and testament, dated 2d November 1819, but did not thereby affect the said moiety of the said copyhold premises; he died, leaving *Henry Saller*, his younger son and heir, according to the custom of the said manor of *Bury*.

The

heir could convey? The Vice-Chancellor was of opinion, that the infant was not a trustee within the act, the trust being a constructive one, and he dismissed the vendor's bill with costs.

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The MASTER of the ROLLS. Are there not many cases deciding that the acts do not apply to constructive trusts?

Mr. Wright. That the statute of *Anne* does not.

The MASTER of the ROLLS. And in what respect does the 6 G. 4. vary it? His Honour considered this case to be not within the statute 6 G. 4. c. 74., and dismissed the petition.

The Vice-Chancellor held; that the legal estate of the premises in question was vested in the infant Defendant, *Jane Watts Green*, and that she was not within the statute 6 G. 4.

JAMES WOOLLEY and Others, on behalf of themselves and all other the Creditors of CHARLES PERKS, deceased, - - - Plaintiffs;

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HALL.
June 26.

AND

JOHN GORDON, ISAAC NEWTON, and several Others, - - - Defendants.

THIS was a petition by the Defendant, *Isaac Newton*, and stated, that in the year 1806, the testator proposed that the petitioner should commence business

Partnership
accounts.
Practice.

decree direct that all accounts be taken, the Master will not take the accounts of a partnership, unless especially directed so to do.

Although a

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with him in the trade or business of buckle manufacturers, and they were to be equally interested in the profits. *Charles Perks* died in *July* 1819, having previously made his will bearing date the 20th *July* 1816, but he did not thereby appoint any executor, and administration, with the will annexed, was granted to Defendant *Gordon*. In the month of *June* 1820, the bill in this suit was filed, praying the usual accounts of personal estate, and that the freehold estates of the testator might, as well by force of the provisions of the will as by the statute, be declared assets to be administered by this Court in payment of the testator's debts, whether simple contract or specialty; and for marshalling the assets, the usual decree followed. And the petition further stated, that the testator was cashier of the partnership; and that upon investigating the accounts, upwards of 5000*l.* appeared to be due to the petitioner on account of the partnership; and that the petitioner had carried in a charge before the Master, as well for that sum as for a further sum of 300*l.* for goods sold and delivered by him to the testator; but the Master refused to allow the claim, on the ground that he was not *directed by the decree to enquire into the fact, whether the petitioner was or was not a partner with the testator, or to take an account of any such partnership*. The petitioner further stated, that the partnership accounts could not be taken under the decree. It was prayed his Honour would order and decree, that the accounts of the partnership might be taken by the Master. This petition was supported by affidavits of the facts therein stated, and it appeared by the affidavits and admissions in the arguments, that this cause had, in its early stages, been conducted by the same solicitors for all parties. And the petitioner complained that his claim had been disallowed by an apparent assent on his part which he never authorised.

Mr. *Bickersteth* and Mr. *K. Parker* in support of the petition. The petitioner was entirely ignorant of what had been going on in the Master's office; and the only question is, whether there has been such *laches* on the part of the petitioner as will affect him? There can be no doubt that he was a partner with the testator up to the time of his death.

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Mr. *Pepys* and Mr. *Hindes* against the petition.

The MASTER of the ROLLS. The answer of this petitioner, with that of many other Defendants in this suit, was put in without oath. Is it possible to conclude a person under the circumstances of this case? It is a misfortune flowing from the same solicitor being employed by all parties. I will not conclude him, who has been very ill treated. The Masters have made a rule not to take an account of a partnership unless they are particularly directed to take the partnership accounts. Yet they are hardly warranted in making that rule, the order being to take all accounts.

Let it be referred to the Master to enquire whether at any time and when the petitioner was a partner with the testator; and if he shall find him to have been a partner, then to take the accounts of the partnership; the accounts to be confined to the business of buckle-making, the petitioner to pay the costs of the petition, and to take the enquiry at his own expense.

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HALL.

June 22.

SIMON and Others v. BARBER and Others.

Legacies.

Substitution.

Charity;

failure of its
object.

The crown.

A. by each of two several codicils to his will, directed his just debts to be paid, and, in particular, a debt of 12*l.*; by the one of them, he gave 100*l.* to a charity, and by the other, he gave 200*l.* to the same charity: Held, that the legacies were not accumulative, and that the latter legacy was only a substitution of the former.

The charitable object having failed, the Court will not apply the funds. Where a charitable object fails, from whatever cause, the crown has a right to interfere. The crown must signify the charitable purpose the fund shall be applied to.

THIS was the petition of three infants, Defendants in this suit.

The testator, *Edward Simon*, made a will on the 16th day of *December* 1789, and seven several codicils and testamentary papers thereto. By his fifth codicil, dated 27th *May* 1805, he makes the following bequest: "My just debts to be paid, as may appear by my book, particularly one of about 12*l.* to one *Tostevin of Guernsey*, who had sent me a power of attorney to receive wages due to him from a man of war. I also wish that out of the first money that may be received from the stocks, that 50*l.* may be bought in my name in the 3 per cent. consols. I also request that 100*l.* stock 3 per cent. consols may be transferred into the name of the trustees of the hospital at *Guernsey*; and also the same to be transferred in the name of the trustees of the hospital at *Jersey*." The sixth of the said codicils, bearing date the 5th day of *June* 1805, was in the following words: "My just debts to be paid, as may be claimed, or as may appear by my book, particularly one of about 12*l.* to one *Tostevin of Guernsey*, who had sent me a power of attorney to receive some wages due from a man of war. I also give and bequeath unto the treasurer, governor, or directors of the *Guernsey* hospital for the time being the sum of 200*l.* stock 3 per cent. bank annuities, to be applied towards carrying on the charitable designs of the said corporation. I also give and be-

queath unto the treasurer, governor, or directors of the said corporation, that they should apply the same towards carrying on the charitable designs of the said corporation.

queath unto my nephew *George Le Bontillier* 1500*l.* stock 3 per cent. bank annuities, over and above the 500*l.* already bequeathed to him in my will or testament now in the hands or possession of my daughter *Elizabeth Simon*, making together the sum of 2000*l.* stock, hoping thereby that he will exert himself in getting in my debts and settling my accounts as they should be."

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v.
BARBER.

By an order bearing date the 6th *July* 1822, after directing the sale of some stock, it was ordered that out of the money to arise from such sale, the sum of 300*l.* should be carried over in trust in this cause, "The account of the *Guernsey Hospital*," and should be laid out in the purchase of bank 3 per cent. annuities, in the name and with the privity of the accountant-general in trust in this cause, "the like account." And it was ordered that the dividends of the bank annuities to be purchased with the said sum of 300*l.* should be laid out in the purchase of like annuities, in the name of the said accountant-general in trust in this cause, "The account of the *Guernsey Hospital*." The Master reported, on the 11th *March* 1828, that it had been stated to him, and verified by affidavit, that at the respective times of making the said codicils, and of the death of the said testator, there were two hospitals in the said island of *Guernsey*, one of which was situated in and supported by the town and parish of *St. Peter's Port*, and in which the poor of the said town and parish were placed, and was known by the name of "The Town Hospital;" and the other of such hospitals was situate in the parish of *St. Mary de Castro*, in which the poor of that and the adjoining parishes were placed, being supported by them, and known by the name of "The Country Hospital." And further, that the said two hospitals had ever since continued, and were still in

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existence, and were the only hospitals which existed at the respective times of making the said codicils, or which then existed in the said island of *Guernsey*. The Master reported that he did not find that there was any establishment in the said island of *Guernsey* answering the description of the *Guernsey* Hospital.

A further reference was afterwards made to the Master, to enquire and state to the Court whether any and what particular hospital was meant or intended by the said testator by the description in his will, in the pleadings stated; and the Master thereupon reported that he did not find that any particular hospital in the said island of *Guernsey* was meant or intended by the said testator *Edward Simon*, by the description in the codicil to his will, and that report was absolutely confirmed.

Mr. *Roupell* for the petitioners, Plaintiffs. The first question on these testamentary papers in respect of the legacy to the *Guernsey* Hospital is, Whether the testator meant to give two legacies? namely, the legacy of 100*l.* by the fifth codicil, and 200*l.* by the sixth codicil, by way of accumulation, or whether the latter legacy was not meant in substitution of the former. Looking at those codicils altogether, it is clear that the testator meant only to give 200*l.* in the whole; there are several circumstances in these codicils that tend to shew this to have been the testator's intention, and in particular that both the fifth and sixth codicils commence by providing for his just debts, and the payment of 12*l.* to one *Tostevin* of *Guernsey*. The second question was, What was to become of this legacy, there being no particular hospital called the *Guernsey* Hospital? Did it not fall into the residue for want of a proper object?

Mr. *Wray*, for the Attorney-General, who had been served with the petition, submitted to the Court that these sums were accumulative, and cited the case of *Hurst and Another v. Beach and Others* (a), heard before His Honour, when Vice-Chancellor, when he said, "Where a testator leaves two testamentary instruments, and in both has given a legacy, *simpliciter*, to the same person, the Court considering that he who has twice given must, *primâ facie*, be intended to mean two gifts, awards to the legatee both legacies; and it is indifferent whether the second legacy is of the same amount, or less or larger than the first."

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The MASTER of the ROLLS. There are circumstances sufficient to shew that the sum given by the sixth codicil was not meant by the testator to be accumulative, but in substitution of that given by the fifth codicil: there being no hospital called "The *Guernsey* Hospital," the particular charitable object of the testator has failed: this Court can give no direction for the application of the fund, but it remains with the crown to signify to what charitable purposes this fund shall be applied. Whenever a charitable object fails, from whatever cause, the crown has a right to interfere.

(a) 5 *Mad.* 358.

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HALL.

July 10.

*Will.**Construction.
Vested in-
terest.*

A testator gave to his wife an annuity, and 100*l.* a year for each of his three children during their minorities; and from and after the decease or marriage of his wife, then the 300*l.* to be divided amongst his said children, in like manner as his other effects, and subject thereto, he bequeathed his leasehold and personalty unto his three children, and the survivors and survivor of them. One of them died under twenty-one: Held, that he took a vested interest at the time of the death of the testator.

BASS v. RUSSELL, Wife, and Others.

EDWARD HAWTHORN by his will, dated the 31st July 1816, gave and bequeathed his leasehold houses, and all other his personal estate and effects, unto his executors, upon trust, out of the rents, interest, and annual proceeds thereof, to pay unto his wife *Elizabeth* the sum of 300*l.* per annum, and the sum of 100*l.* per annum for each of his children, which was to be paid to her during their respective minorities, for their support and maintenance; and from and after the decease or marriage of his said wife, then the said sum of 300*l.* was to go and be divided amongst his children, in like manner as the other part of his estate and effects was thereafter by him given to them, and thereafter mentioned; and, subject as aforesaid, he gave and bequeathed his said leasehold houses, and all other his personal estate and effects, unto his three children, *Harriet Hawthorn*, *Margaret Hawthorn*, and *Edward Hawthorn*, meaning *Edward B. Thomas Hawthorn*, and the survivors and survivor of them, share and share alike: and he declared it to be his will, that the provision thereby made to his daughters was for their sole use, independent of any husbands they might marry. And he appointed his wife, and *Wm. Barron*, Esquire, and *James Thomas* executors, who duly proved the will.

Elizabeth Hawthorn, the widow, died.

E. B. T. Hawthorn, having survived the testator, died in the year 1824, under the age of twenty-one years, unmarried and intestate, leaving his sisters of the whole

blood, *Harriet* and *Margaret*, him surviving; and the Plaintiff and the Defendant *Sarah Russell*, his brother and sister of the half blood, his only next of kin, him surviving:

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v.
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Letters of administration to the effects of the intestate were granted to *Sarah Russell*, with the assent of the Defendant *George Russell*, her husband.

The Plaintiff's bill charged, that the intestate, upon the death of the testator, became entitled to a vested interest in the one third part of such residuary estate, and which, upon the death of the intestate, became divisible amongst his next of kin. The case made by the answers of the sisters of the whole blood was, that, on the death of the intestate, his one third of the residuary personal estate devolved to and became divisible between them.

Mr. *Roupell* and Mr. *Pemberton* for the Plaintiff. There is nothing in this will to postpone the vesting beyond the time of the death of the testator. By the last clause of the will, two of the children, being daughters, were to have their shares for their separate use; and it is inconsistent with that provision that the vesting should be postponed.

Mr. *Pepys* and Mr. *Elliston* for the two sisters of the whole blood. The testator having provided for the three children during their minorities, he gave his property to his children, and the survivors and survivor of them; that is to say, to those who should be then in existence after their minorities had passed, thereby postponing the vesting until the children should attain twenty-one. They cited *Russell v. Long(a)*, *Mendes v. Mendes.(b)*

(a) 4 *Ves.* 551.

(b) 3 *Atk.* 619.; and see *Roebuck v. Dean*, 2 *Ves.* jun. 265.

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Mr. *Jemmett*, for another Defendant, cited *Cyff's v. Woolcott. (a)*

The MASTER of the ROLLS.

This is a gift that must necessarily take effect at the death of the testator ; and the words, survivors and survivor of them, must be referred to the time at which they are to take — the death of the testator.

Declare that the intestate *E. B. T. Hawthorn* took a vested interest in one third part or share of the residuary estate of the testator.

(a) 4 *Madd.* 11.

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CAPPER v. SPOTTISWOODE and Others,
Assignees.

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HALL.

July 10.

THE Plaintiff sold to *Thomas Hurst, John Hurst, and Joseph Ogle Robinson*, the fee-simple of lands in *Yorkshire* for 34,000*l.*, and conveyed the same accordingly by indentures of lease and release, bearing date 18th and 19th of *July* 1825.

Lien.

Vendor and purchaser.

Only 12,000*l.* of the purchase-money was paid; the remainder was secured by the bond of the purchasers, dated 20th of *July* 1825, and a re-conveyance, dated 19th and 20th of *July* 1825, of certain parts of the purchased property by way of mortgage.

A vendor, who has taken, as a security for part of the purchase-money, the bond of the vendees and a mortgage of part of the property sold, cannot, on the bankruptcy of the vendees, establish a lien on the entire estate.

The purchasers afterwards became bankrupt, and the Plaintiff alleged, that the part of the lands in mortgage were an inadequate security; and the short point in this case was, whether the Plaintiff was entitled to a lien on the whole estate.

The MASTER of the ROLLS decided that he was not entitled to it.

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HALL.

June 22.

*Infants.**Maintenance.**Practice.*

The father of infants had maintained and educated them since the death of their mother, when they became entitled to a sum of money in this court. The father petitioned for a reference to the Master on the subject of maintenance and education of the children, and for an allowance, as well for the time past as in future; but the Court refused to make any reference to the Master with respect to the maintenance of the infants in the time passed, but made the usual reference with respect to their future maintenance out of the funds, in case the father was not himself of ability to maintain them.

SIMON et Ux. and Others v. BARBER and Others.

THIS was the petition of *Robert Dodgson*, one of the Plaintiffs, setting forth an order, bearing date the 26th July 1822, whereby it was declared that *Elizabeth Dodgson*, the deceased wife of the petitioner, was entitled for life to the interest of a moiety of 2000*l.* and of the clear residue of the testator's estate; and that her issue would become entitled to the capital thereof on her death; and that 2000*l.* should be carried to the account of the Plaintiff, *Elizabeth Dodgson*, to be laid out, and the same was laid out in the purchase of 252*3l.* 1*3s.* 3*d.* 3 per cent. Bank annuities. There were other residuary funds. *Elizabeth Dodgson* died in April 1823, leaving three children, who were Defendants to the suit, and on her death became entitled. The dividends had been laid out in the purchase of stock.

The petitioner stated circumstances of inability to continue to maintain and educate his children, and that he had been at a great expense in educating and maintaining them since the death of his wife. The prayer was for a reference to the Master, to enquire into the petitioner's ability to maintain and educate the children; and if the Master should find that the petitioner had not been of ability since the year 1825, then that the Master should enquire and report who had maintained and educated them; and what had been properly expended or ought to be allowed on that account; and out of what funds or fund the same ought to be paid. And in case the Master should find the petitioner not to be

of ability to maintain them.

now of ability to maintain and educate his said infant children, then that he should consider and report what would be proper to allow for their future maintenance and education, regard being had to their fortune and circumstances, and also out of what funds.

1829.

SIMON

v

BARBER.

Mr. Rouspell for the petitioner.

Mr. Richards for the infants.

The MASTER of the ROLLS. It is not usual to make any reference on the subject of maintenance retrospectively. Take the order with respect to future maintenance.

SAINT JOHN v. CHAMPNEY, Bart. and Others.

WESTMINSTER
HALL.

SAME v. STIRLING, Bart. and DANCE.

June 26.

THE Court refused to allow a petition to be amended *Practice.*
by substituting another person for the petitioners,
who, on the hearing of the petition, appeared to have
no title.

1829.

BETWEEN

WESTMINSTER
HALL.
June 23.

WILLIAM MONK and ESTHER his Wife, WIL-
LIAM HUTCHINSON and ANN his Wife,
Plaintiffs ;

AND

PETER MAWDSLEY and ARCHIBALD
KEIGHTLEY, - - - Defendants.

Will.

Construction.

Devise.

Estate for life.

A., a married woman, having, by virtue of her marriage-settlement, power to appoint her personalty and a freehold to such person as she should direct, with remainder to a trustee to sell, and distribute amongst her next of kin, gave, devised, and bequeathed to her husband the freehold, by the description of her two fields and house; likewise the remainder of her personalty, and all she might die possessed of at the time of her death, after certain previous bequests and her just debts were discharged, and appointed him and another executors: Held, that the husband took only an estate for life, and that the next of kin were entitled to the monies to arise by a sale of the reversion.

ARABELLA MAWDSLEY, by her marriage settlement with *Peter Mawdsley*, conveyed and assured a messuage, land, and hereditaments in *Great Neston*, of which she was seised in fee-simple, unto and to the use of the Defendant *Archibald Keightley*, his hers and assigns, and assigned unto him, his executors, administrators, and assigns, certain leasehold premises, and also all her bonds and other securities for money; and also all and singular her household goods, plate, linen, china, and furniture, and all other her personal estate and effects. Then follow trusts for the separate use of the settlor during her life; and as to the freehold messuage, land, and premises, from and after her decease, to the use of such person and persons, and for such estate and estates, uses, ends, intents, and purposes as she, notwithstanding her intended coverture, and whether she should be sole or covert, by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, to be by her signed, sealed, and published in the presence of two or more credible witnesses, should appoint; and in de-

fault of such appointment, to the sole and absolute use of *Archibald Keightley*, his heirs and assigns for ever, upon trust to sell the same; and as to the money to arise from such sale or sales, upon trust to pay, distribute, and divide the same unto and equally amongst such of her children as therein mentioned; but if there should be no children or child of the said *Arabella*, then upon trust to distribute the same in a due course of administration amongst her next of kin, in such manner as her personal estate would be distributable if she should happen to die a *feme sole*, and should not make any testamentary disposition of her personal estate. *Arabella Mawdsley* died without children, having made her will in writing bearing date 20th *April* 1824, and executed by her in the presence of and attested by three credible witnesses in the words or to the effect following:—“ In the name of God. Amen. I, *Arabella Mawdsley*, wife of *Peter Mawdsley* of *Moorside*, in the county of *Chester*, do make this my last will and testament in manner and form following, having full disposing power by settlement made at my marriage with the above *Peter Mawdsley*, now in the hands of Mr. *A. Keightley*, senior, solicitor, *Liverpool*, and my trustee.” The testatrix gave several legacies; and the will then proceeds thus: “ I give, bequeath, and devise to my husband *Peter Mawdsley* my two fields and house in the township of *Great Neston*; likewise the remainder of my personalty, and all I may die possessed of at the time of my death, after the above bequests are fully discharged, my just debts paid, funeral expences, and proving this my last will and testament. I nominate and appoint Mr. *A. Keightley* and my husband *Peter Mawdsley* trustees and executors of this my last will and testament, revoking all other wills made by me at any time.”

1829.

MONK
v.
MAWDSLEY.

1829.
 {
 MONK
 v.
 MAWDSLEY.

The testatrix died on the 24th *May* 1824, leaving the Plaintiffs *Esther* and *Ann*, her only sisters, and only next of kin, and soon after her death the Defendants, *Archibald Keightley* and *Peter Mawdsley*, proved her will. *Ann* married the Plaintiff *Hutchinson*.

The bill stated the preceding facts, and that *Peter Mawdsley* claimed to be entitled in equity to the fee-simple of the messuage, lands, and premises devised to him by the will; but the Plaintiffs submitted that he was only entitled to a life-estate therein, and that Plaintiffs *Esther* and *Ann*, as the next of kin of *Arabella Mawdsley*, were entitled to have the house, land, and premises sold (subject to the life-estate of *Peter Mawdsley* therein), and to have the proceeds arising from such sale distributed between them, according to the directions of the indenture of settlement; and prayed that the Defendant, *Archibald Keightley*, might be decreed to sell the reversion of the messuage, land, and premises, expectant on the life-estate of *Peter Mawdsley* therein, and to distribute the proceeds arising therefrom amongst and between the Plaintiffs, according to the directions contained in the indenture of settlement.

The Defendant, *Peter Mawdsley*, by his answer, said he had been advised by two eminent barristers at law, that according to the construction of the will he was entitled in fee-simple to the messuage, lands, and premises devised and appointed to him by the will; and that, according to the true construction of the will or testamentary appointment, the whole of the real and personal estate of or to which the testatrix was possessed or entitled was thereby devised and bequeathed, and that she did not die intestate as to any part thereof, and that, therefore, the Plaintiffs were not in any manner interested therein;

and the Defendant insisted that according to the true construction of the will and testamentary appointment, he was entitled to the fee-simple of and in the messuage, lands, and premises devised or appointed to him by the will, as in the bill mentioned, and that the complainants, as the next of kin of *Arabella Mawdsley*, were not entitled to have the said messuage, lands, and premises sold, subject to his life-estate therein, or to have the proceeds arising from such sale divided between them, according to the directions of the indenture of settlement.

1829.
 }
 MONK
 v.
 MAWDSLEY.

The Plaintiff, *Esther Monk*, having died, and *Charles Monk* having obtained letters of administration to her effects, the bill was revived by him.

This case was argued before Sir *John Leach*, when Vice-Chancellor, on demurrer, on the 30th April 1827, and he then decided that the husband took a life-estate only in the realty.

Mr. Bickersteth for the Plaintiffs.

Mr. Preston for the Defendants. The authorities are very nice upon this subject; and we do not argue it, only because the principal point has already been decided by your Honor upon demurrer. (a)

The MASTER of the ROLLS declared that the husband took an estate for life in the two fields and house in *Great Neston*, and decreed that the trustee proceed to a sale of the reversion, and receive the purchase-money, and thereout pay the expenses of the sale, and the costs of

(a) 1 *Simons*, 286.

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MONK
v.

MAWDSLEY.

all parties to this suit; and then pay one moiety of the clear residue to *Charles Monk*, as administrator of *Esther Monk*; and the other moiety into the Bank, with the privity of the Accountant-General, to the account of *William Hutchinson* and *Ann* his wife, subject to the further order of the Court, with liberty to apply.

Note. — As to the effect of the words, “All I may die possessed of,” see *Pitman and another v. Stevens, Newte and others*, 15 *East*, 505., and the cases collected in 2 *Prest. on Est.* 173, 174. Amongst the cases that have been cited in the course of this suit are *Denn dem. Moore v. Mellor*, 5 *T. R.* 558.; *Doe v. Ramsbottom*, and *Roe v. Daw*, 3 *M. & S.* 516. & 518.; *Smith v. Coffin*, 2 *H. Bl.* 444.; *Barnes v. Patch*, 8 *Ves.* 604.; *Cooke v. Ferrand*, 7 *Taunt.* 122.; *Goodtitle v. Maddern*, 4 *East*, 496.

WESTMINSTER
HALL.

July 6.

PURDIE v. MILLETT and Others.

*Inadequacy of
consideration.*

A. having deposited leases with *B.* to secure monies borrowed at different times from 1805 to 1813, in the latter year signed an agreement, giving up all his interest to the mortgagee; it was proved that the sum due to the mortgagee was a very inadequate consideration.

IN the years 1805 and 1806, *William Millett* deceased, the Defendant's testator, lent to Plaintiff 213*l.*, and Plaintiff deposited with him a lease for twenty-one years from 1797, of five houses, which produced a net rental of 84*l.* On a further advance of 62*l.*, making with the former loan 275*l.*, the Plaintiff deposited with him an agreement in writing, for a lease for twenty-one years, from *Christmas* 1810, of five other houses, which produced the further clear rent of 36*l.* In *June* 1813, there was a further advance of 72*l.* on a promissory

On a bill to redeem, and that the agreement should stand only as a security: Held, that the Plaintiff was not entitled to relief in equity, and bill dismissed.

note, and in *August* the further sum of 44*l.* on a promissory note; and at the time of each of these advances, the Plaintiff agreed that the sums advanced should be secured by the deposit of the lease and agreement.

1829.
 PURDIE
 v.
 MILLETT.

The deceased entered into the receipt of the rents in 1813. The lease of the more valuable part of the property expired in 1818.

There were various charges in the bill, to impugn an agreement for the equity of redemption of the property set up by the Defendants, and the bill prayed that the agreement might be declared void or stand only as security; that the accounts might be taken; and that the Plaintiff might redeem.

The Defendants by their answer set forth an account and some promissory notes, found amongst the papers of the testator; and also an agreement, in writing, signed by the Plaintiff, and which was in the words and figures following; — viz.

“ *London, 18th February 1815.*

“ Memorandum. — I, the undersigned, *Richard Purdie*, in consideration of monies due from me to Mr. *William Millett*, of *Burdett Place*, in the *Kent Road*, in the county of *Surrey*, gentleman, do hereby agree to give up all my interest in my ten houses, situate in *Kingsland Road, Shoreditch*; and of which houses the said *William Millett* is now in receipt of the rents.

“ RICHARD PURDIE.”

“ Witness, JAMES PEARCE,

“ 13. *Paternoster Row.*”

And Defendants said they believed that the deceased became entitled to the premises by the said purchase; and they admitted it to be true, that the rents and monies

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PURDIE
v.
MILLETT.

so received, in case the same had been applied thereto, would long since have been sufficient to pay and satisfy the alleged principal sum of 275*l.* and all interest due thereon; but Defendants denied, to the best of their knowledge and belief, that the said rents and monies ought to be so applied; and Defendants believed, that if such sum of 275*l.* and interest were due to the said *William Millett*, the same were long previously to his death liquidated and discharged by means of such purchase of the said premises, and not by means of the rents and profits received by the said *William Millett*, as in the bill alleged.

The Defendants submitted, that the Plaintiff was bound to execute an assignment: they denied fraud in obtaining the agreement; denied that 275*l.* was the only consideration; but Defendants believed that all the monies then due from the Plaintiff to the deceased were the consideration of the agreement.

There was some slight parol evidence to show that by the agreement security only was intended; but the solicitor of the mortgagee, who drew the agreement, and who was present at its execution, denied that any thing passed thereat to qualify it; and swore to his belief, that he had no reason for supposing the parties did not understand the purport and effect thereof. There was evidence of the value of the property, and which showed the inadequacy of the consideration.

Mr. Pepys and *Mr. Girdlestone, jun.* The object of this bill is to obtain an account, to redeem the interest remaining in the leaseholds, and to make void an agreement set up by the Defendants, for giving up the equity of redemption. At the time it is pretended that this agreement was executed, there was about 100*l.* per

annum applicable to the payment of the principal, and only 200*l.* then remained due; yet by this agreement the Plaintiff simply, and for nothing, releases his equity of redemption. The Plaintiff was receiving parochial relief, and the agreement was prepared by a person employed by the mortgagee. Fraud was originally intended, and a fraudulent use has been made of the agreement.

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PURDIE
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MILLETT.

Mr. *Norton* for the Defendant.

The MASTER of the ROLLS could not discover any principle upon which the Court could give the relief prayed by the bill. The consideration was not adequate to the value of the property, but the Court would not on that ground set aside this agreement. It was also proved that the Plaintiff was in distress; but no advantage was taken of that circumstance, for no money was advanced at the time of signing the agreement: the paper was remarkably short; and the terms were so simple and explicit, that the Plaintiff could not have misunderstood them. The agreement was unnecessary as a mortgage security, for the mortgagee had already a deposit of the leases, and was in receipt of the rents. The case was one in which the Court could not interfere.

Bill dismissed with costs.

1829.

BETWEEN

WESTMINSTER
HALL.
July 6.

JAMES RICHARD DENYER and Others, and
CHARLES DENYER WRIGHT and Others,
Infants, by their next Friend, - - Plaintiffs;

AND

CHARLES DRUCE the Elder and Others; the
Mayor, Commonalty, and Citizens of the City of
LONDON; the Chancellor, Masters, and Scholars
of the University of OXFORD; and Sir JOHN
SINGLETON COPLEY, Knt. His Majesty's At-
torney-General, - - Defendants.

Charities.

Costs.

Trustees.

Identity.

The Crown.

A., by her will,
gave 7000*l.* to
the governors
of *Christ's*
Hospital, upon
trust, for cer-
tain specific charities, and to pay certain annuities, and to apply 40*l.* per annum to the scholars of *Christ's* Hospital.

In case the governors refused to accept the trust, then the 7000*l.* was given to the trustees of the Rev. *William Hetherington's* charity, for the like trusts, except as to the 40*l.* per annum, which was to be applied to the purposes of the latter charity.

The testatrix also gave 2000*l.* to the university of *Oxford*.

The governors and trustees refused to accept these trusts, and the legacy of 40*l.* per annum.

The university also refused to accept the legacy of 2000*l.* :

Held, that whenever a charitable legacy, from whatever cause, fail, the crown has a right to interfere, and that the legacies of 2000*l.* and 40*l.* per annum must be applied to such charitable purposes as the crown shall direct.

Held, that as to the 7000*l.*, a reference be made to the Master to appoint new trustees.

The bill dismissed as against the governors, trustees, and university.

ELIZABETH DENNIS DENYER made her will,
bearing date the 16th *August* 1821, and thereof
nominated and appointed *Charles Druce* the elder, *Wil-*
liam Tebbs, and *Benjamin Shaw* executors in trust; and
after bequeathing a great many legacies of money and
stock, all of which have been paid or provided for, the
testatrix gave and bequeathed as follows: — “ I give
and bequeath to the governors of the revenues and pos-

trust, for cer-
tain specific charities, and to pay certain annuities, and to apply 40*l.* per annum to the scholars of *Christ's* Hospital.

In case the governors refused to accept the trust, then the 7000*l.* was given to the trustees of the Rev. *William Hetherington's* charity, for the like trusts, except as to the 40*l.* per annum, which was to be applied to the purposes of the latter charity.

The testatrix also gave 2000*l.* to the university of *Oxford*.

The governors and trustees refused to accept these trusts, and the legacy of 40*l.* per annum.

The university also refused to accept the legacy of 2000*l.* :

Held, that whenever a charitable legacy, from whatever cause, fail, the crown has a right to interfere, and that the legacies of 2000*l.* and 40*l.* per annum must be applied to such charitable purposes as the crown shall direct.

Held, that as to the 7000*l.*, a reference be made to the Master to appoint new trustees.

The bill dismissed as against the governors, trustees, and university.

sessions of the hospital called '*Christ's Hospital*,' in *London*, the principal sum of 7000*l.* stock in the consolidated 3 per cent. annuities; and I direct my executors to transfer the same stock to the said governors accordingly within six months after my decease. And I will and direct that the said governors shall stand possessed of the said sum of 7000*l.* consolidated annuities, and the interest and dividends thereof, upon the trusts and for the purposes after mentioned," which purposes were the payment of several annuities and many specific charities, and amongst them is the following: — "And as a compliment to the said institution of *Christ's Hospital*, and by way of encouragement to learning, I will and direct that the said governors of *Christ's Hospital* for the time being do and shall annually, and for ever, retain, for the purposes after expressed, the annual sum of 40*l.* other part of the dividends and interest of the said sum of 7000*l.* consolidated annuities; and that they do and shall on or before the 5th of *August* in every year give the sum of 10*l.* each to three scholars of the said hospital proficient," as therein mentioned. They were also directed to pay the sum of 30*l.* per annum, further part thereof, to *Melino Garthwaite*, spinster, (meaning, it is contended, *Sarah Garthwaite*, spinster,) for and during the term of her natural life. The will then proceeds as follows: — "And it is my will that neither the principal, or interest, or dividends of the 7000*l.* consolidated annuities shall ever be applied or liable to pay the expence of any law-suit or litigation whatsoever. And in case the said governors of *Christ's Hospital* should refuse to take upon themselves the trust hereby reposed in them, but which I earnestly hope will not be the case, then and in such case I will that the said sum of 7000*l.* consolidated annuities shall be transferred to the trustees for the time being of the Rev. *William Hetherington's* Charity for the

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v.

DRUCE.

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DRUCE.

Blind, upon the several trusts and for the several purposes hereinbefore expressed, and in furtherance of the object of the same." [Except as to the said annual sum of 40*l.*, which was to be applied to the general purposes of Mr. *Hetherington's* charity.] "I give and bequeath to the Chancellor, Masters, and Scholars of the University of *Oxford* for the time being, in their corporate capacity, the principal sum of 2000*l.* stock in the consolidated 3 per cent. annuities. And I direct my executors to transfer the same stock to the said Chancellor, Masters, and Scholars accordingly, within six months after my decease; and that they shall stand possessed thereof and of the interest and dividends of the same upon the trusts and for the purposes after expressed," which were, to apply the dividends thereof in two prizes of 30*l.* each to two members of the University of *Oxford*, as an honorary reward for the two best sermons as therein mentioned.

The testatrix then directed that all the remainder of her personal estate and effects whatsoever and wheresoever should be divided into five equal parts, which she gave and bequeathed as therein mentioned.

The testatrix died on the 6th of *April* 1824; and soon after her death, *Charles Druce* the elder, *William Tebbs*, and *Benjamin Shaw*, the executors, proved her will, and paid her debts.

The bill stated the preceding facts, and that at the time the testatrix made her will there was no person in existence of the name of *Melino Garthwaite*, but that the testatrix was acquainted with *Sarah Garthwaite*, who had a sister called *Melino Garthwaite*, who had been dead many years, and that the testatrix meant and intended to give to *Sarah Garthwaite* the legacy which

was by the will given to *Melino Garthwaite*, and that *Sarah Garthwaite* claimed to be entitled to such legacy. That the mayor, commonalty, and citizens of the city of *London* were the governors of the possessions, revenues, and goods of the hospitals of *Edward* late King of *England*, the *Sixth*, of *Christ*, *Bridewell*, and *St. Thomas the Apostle*, and were also trustees of *Hetherington's* fund for the blind, which was the charity meant and intended by the testatrix under the description of the *Rev. William Hetherington's* Charity for the Blind; and that the three executors having possessed sufficient assets of the testatrix were willing, and had offered to transfer to the mayor, commonalty, and citizens of the city of *London*, as governors of *Christ's* Hospital, the sum of 7000*l.* 3 per cent. consolidated bank annuities, which was given to them by the will, but that the mayor, commonalty, and citizens as such governors, as it was alleged, declined to accept the legacy on the trusts in the will mentioned. And that upon their having so declined to accept the legacy, the executors had offered to transfer the 7000*l.* to the mayor, commonalty, and citizens of the city of *London* as trustees of *Hetherington's* fund for the blind; and that the mayor, commonalty, and citizens again, as it was alleged, refused or declined to accept the legacy; and that under such circumstances the sum of 7000*l.* 3 per cent. consolidated Bank annuities remained standing in the books of the Governor and Company of the Bank of *England*, in the name of *Elizabeth Dennis Denyer*, deceased. And that the annuitants claimed to be interested therein in respect of the several annuities to them respectively given by the will, and thereby made payable out of the dividends and interest thereof; and that *Sir John S. Copley*, Knt., His Majesty's Attorney-General, claimed to be interested in the 7000*l.* 3 per cent. consolidated Bank annuities, or the dividends and interest thereof, in

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v.
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DRUCE.

respect of the charitable purposes for which certain parts of such dividends and interest were by the will directed to be applied.

The bill also stated, that the executors were ready to transfer the 2000*l.* stock to the Chancellor, Master, and Scholars of the University of *Oxford*, but they had declined to accept the same. The residuary legatee and the next of kin each claimed the 2000*l.*, if refused by the University.

His Majesty's Attorney-General, in case the corporation of *London* refused to perform the trusts, claimed the 7000*l.* for the purposes of the will, under the directions of the Court.

The bill prayed the usual accounts; and in case the corporation of *London* and the University of *Oxford* refused to accept all interest in the legacies bequeathed to them by the will, that the same legacies might be transferred into the name of the Accountant-General, to be dealt with as the Court should direct. The corporation of *London*, by their answer, disclaimed the 7000*l.*, both as trustees of *Christ's Hospital* and of *Hetherington's fund*, and the University of *Oxford* also declined to accept the legacy of 2000*l.*

Dennis Wright, spinster, by her answer, submitted that these two sums had by these refusals sunk into the residuary estate.

The next of kin submitted that the legacy of 2000*l.* was to be treated as not disposed of, and belonged to them.

Mr. *Pepys* and Mr. *K. S. Parker* for the Plaintiffs.

Mr. *Barber* for the executors.

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Mr. *Wray* for the Attorney-General.

DENYER
v.
DRAUCE.

The MASTER of the ROLLS. I have lately decided that whenever a charitable legacy, from whatever cause, fails, the crown has a right to interfere. The legacy of 2000*l.* and annual payment of 40*l.* have been refused by the charitable institutions on which the testatrix conferred them, and those bequests have consequently failed: it results that it rests with the crown to direct the charitable purposes to which they shall be applied.

With regard to the bequest of 7000*l.*, the trustees named having refused to perform the duties prescribed by the will, the Court will appoint other trustees, for which purpose a reference must be made to the Master.

The 7000*l.* and 2000*l.* to be paid into Court.

An enquiry may be made, who was the person intended by *Melino Garthwaite*, at the expense of the person requiring it.

When there is a doubt about the identity of a legatee, the Court will direct an enquiry at the expense of the person requiring it.

The other necessary enquiries were directed, and the bill dismissed, as against the corporation of *London* and the university of *Oxford*.

Costs of all parties to be paid, but no costs to come out of the 7000*l.*

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BETWEEN

WESTMINSTER
HALL.
July 7.

THOMAS ELWORTHY, WILLIAM ELWORTHY, and MARY BIRD, - - Plaintiffs;

AND

WILLIAM BIRD, - - Defendants.

Legal consideration.

Agreement of counsel.

Evidence.

Specific performance.

A husband being prosecuted and found guilty at the quarter sessions, of an assault upon his wife, the Court recommended an accommodation of the disputes and differences between them. The counsel of the parties signed

a memorandum of agreement, that the husband should allow the wife an annuity of 50*l.*, and the Court, adverting to the arrangement, passed sentence upon the Defendant, imposing only a nominal fine upon him. It was proved that the Defendant's attorney stated publicly in court, that the Defendant had come into the agreement, and that the Defendant was in court when the arrangement was entered into. The Defendant, by his answer, denied that he ever consented to it; and on his part there were depositions that to some extent supported it:

Held, that it was not incumbent on the Plaintiffs to prove that the Defendant did assent to an agreement entered into by his counsel, but on the Defendant to disprove it.

Held, also, that the weight of the evidence being that the Defendant did not dissent, a court will conclude a counsel had authority.

Held, that the Plaintiffs were entitled to a decree for a specific performance, with costs.

THE bill stated the marriage of the Plaintiff *Mary Bird* with *William Bird*, and various acts of ill usage by him, and indictments for assault, in which he was found guilty at the *Midsummer* quarter sessions 1822, for the county of *Somerset*, when the justices recommended an accommodation of the disputes between the parties, and an agreement was come to by the counsel on their behalf and by their authority; and that the plaintiff would consent to the court imposing a nominal fine, as follows: "*Rex v. William Bird*: upon a verdict of guilty in this case, a nominal fine was by consent of prosecutrix imposed on Defendant, 1822, *July 18th*; it being agreed that a deed of separation shall be executed by Mr. and Mrs. *Bird*, and *Thomas Elworthy*, the father of Mrs. *Bird*, and *William Elworthy* her brother, who shall be trustees on her behalf,

by which 50*l.* a year for her life, payable quarterly by said Mr. *Bird*, shall be sufficiently secured to Mrs. *Bird*, to commence the 1st day of *April* 1821; the arrears of which to be paid by said Mr. *Bird*; and also covenants on the part of Mr. *Bird* not to molest Mrs. *Bird*; and also covenants from *Thomas Elworthy*, the father of Mrs. *Bird*, and *William Elworthy* the brother, to indemnify the Defendant against the debts of Mrs. *Bird*; and that Mr. *Bird* shall not be molested by her. All actions and indictments which have been brought and preferred, and which are still pending, for any matter or thing done or said by Mr. and Mrs. *Bird*, or either of them, or by their respective relations and servants, or any or either of them, relating to or connected with the conduct either of Mr. or Mrs. *Bird*, and all actions now pending against any other persons for criminal conversation with Mrs. *Bird*, shall be discontinued; and that no further actions shall be brought, or proceedings had, for or on account of any thing done, or said, to or by the said Mr. or Mrs. *Bird*, or their respective families or servants, up to and including the date of this agreement. *Thomas Erskine*, counsel for the Defendant; *C. C. Bompas*, counsel for the Prosecutrix." The bill further stated, that the substance of the agreement was stated to or in the presence and hearing of the justices, who did not object thereto, but approved of the same, and consented thereto, and sanctioned the same; and in consequence thereof, they sentenced the Defendant to a fine of one shilling only, and ordered the trials of the other indictments to be respited.

The bill then stated that the Defendant had refused to execute the proper deed, or to pay the arrears, and that the Plaintiffs had offered to give him the proper indemnity against the debts of *Mary Bird*. The prayer was for a specific performance.

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 ELWORTHY
 v.
 BIRD.

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The Defendant by his answer admitted that the counsel did enter into the agreement mentioned in the bill ; but he denied that the agreement was come to with his authority or consent, he having positively refused to authorise his counsel or any other person to consent to the same, or any other agreement ; and he submitted that he ought to be permitted to dispute the fact of his having assented to the agreement ; and he further submitted, that the agreement ought not to be specifically performed, because on the face of it such agreement was illegal, for divers causes thereon appearing, and was such an agreement as a court of equity ought not specifically to perform ; but more particularly, because part of the consideration upon which the agreement was alleged to have been entered into was the compromising an indictment then already preferred against him by his wife *Mary Bird* for a misdemeanor, and suppressing other indictments and actions which had then been brought and preferred, and which were then pending, for matters and things done and said by him and the Plaintiff *Mary Bird*, and by their respective relations and servants, relating to and connected with the conduct of him and the Plaintiff *Mary Bird*, and other actions then pending against persons for criminal conversation with the Plaintiff *Mary Bird* ; and further actions which might be brought, or proceedings had, on account of things done or said to or by him the Defendant and the Plaintiff *Mary Bird*, and their respective families and servants, and also because the object of such alleged agreement was to effect a separation between him and the Plaintiff *Mary Bird*.

The depositions on the part of the Plaintiff proved, that Mr. *Poole*, the Defendant's solicitor, on the trial of the indictment, stood on the counsel-table in court, and stated openly and audibly to the Court, in allusion to

the arrangement, "We agree to it," or words to such or the like effect, and that the Defendant was present in Court when the verdict was returned; also when the treaty took place, and when Mr. *Poole* made the statement; that the counsel for the prosecution stated openly in Court the terms of an arrangement, which were, that the Defendant *William Bird* should allow the Plaintiff *Mary Bird* the sum of 50*l.* per annum, and that all pending actions on either side should cease; and that afterwards, Mr. *Poole* stood upon the counsel-table and said, "Mr. *Bird* (meaning the Defendant) accedes to it," or words to that effect, and that such statement, made by Mr. *Poole*, was made openly and audibly in court; that the Defendant *William Bird* was present in court when the verdict was returned, but whether he was in court when the whole conversation took place the deponent could not state, but the Defendant was present in court when his attorney made the statement deposed to; that immediately after the arrangement had been made, the Defendant left his seat below the magistrates' bench, and went to the opposite side of the counsel-table, when the chairman addressed him by telling him, that as an arrangement had been come to, the Court would only impose a nominal fine upon him, or words to that effect, and pronounced sentence, fining him 1*s.*

And the chairman of the quarter sessions deposed, that the magistrates did believe that a treaty for a compromise was proceeding, and the Court waited and suspended its business whilst the same was proceeding; and that Mr. *Erskine*, the Defendant's counsel, openly and audibly stated to the Court that a compromise or arrangement was agreed to; (that was to say,) as deponent best recollected, that the Defendant was to allow his

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wife 50*l.* a year, but that they were to live separate, and that the Defendant agreed to such compromise or arrangement; that the Defendant was present in court when the verdict was returned, and whilst the conversation and treaty took place; and when the statement was made by Mr. *Erskine* to the Court, and from what passed on that occasion, deponent understood and believed, that the Defendant agreed to the compromise or arrangement; that sentence was passed or pronounced upon the Defendant by the Court, namely, that the Defendant should pay a nominal fine, (as deponent best recollected, 1*s.*) and which sentence was passed or pronounced immediately after the statement was so made by Mr. *Erskine*, and that the Court approved of and sanctioned the compromise or arrangement; and the same was taken into consideration upon passing or pronouncing the sentence, and that the Court made a common order for respiting the trials of some other indictments against the Defendant for (as deponent best recollected) assaults, and which order was made in consequence of the compromise or arrangement having been agreed to; but whether such indictments were against other persons besides the Defendant *William Bird*, the deponent did not recollect.

On the part of the Defendant, there were depositions by one person who stated himself to have been within hearing of what passed between the Defendant and his attorney and counsel at the sessions, when the Defendant positively stated that he would not allow his wife any thing; and the attorney himself deposed, that the Defendant refused to come into the arrangement; but he could not say whether the agreement was signed by the Defendant's counsel with or without the authority, privity, or consent of the Defendant, or on his behalf.

Mr. *Bickersteth* and Mr. *Jacob* for the Plaintiffs. It is now determined that this is an agreement which the Court will carry into execution. A demurrer to this bill has been over-ruled. (a) The Bench, at the quarter sessions, on the trial of the indictment, recommended a settlement of the disputes and differences between the parties. An arrangement was accordingly made and reduced into writing, and signed by counsel, and it is sworn that the Defendant was present: we have only to prove that he consented.

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The MASTER of the ROLLS. You have not so much to do; for it being proved to have been signed by counsel on both sides, it is for the Defendant to disprove it.

Mr. *Richards*, for the Defendant. The Defendant's answer and evidence show that he did refuse to enter into the terms of the compromise: there is evidence showing his positive dissent; and the Plaintiff has not been able to read, out of the Defendant's answer, any one sentence in support of the agreement.

Mr. *Knight* followed for the Defendant. I shall not question what your Honour has said with respect to the demurrer. On the demurrer, you, Sir, were called upon to decide, whether the Court could entertain a suit to execute an agreement grounded on the consideration of a compromise of a misdemeanor; but now, at the hearing, the question is, Whether this is an agreement fit to be performed? Will the Court interfere when the party has her remedy at law to recover her annuity? The Defendant has signed nothing; but his counsel's signature is on the brief. A party trusts

(a) *Elworthy v. Bird*, 2 Sim. 372.

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his counsel as to the particular cause in which the brief is delivered to him, but does not make him his agent for a purpose foreign to the cause. Agent is the language of the statute of frauds, and an annuity is an hereditament. Now, if such an annuity may be charged upon a person by an indorsement of counsel on his brief in the hurry of quarter sessions, he may equally make away with an estate of 4000*l.* a year. A party trusts his counsel with the management of a particular cause, but not beyond it. But, supposing the agreement of a counsel sufficient to bind a party, it is at least doubtful whether the Defendant concurred in this instance. The Defendant denies that he did, and the attorney supporting him in that denial, the Court will at least grant an issue.

The MASTER of the ROLLS. This is an agreement upon which no adequate remedy can be had at law; it cannot, therefore, be sent to law. The prior conduct of the party is out of the question. This agreement concludes the parties, and the only question is, Whether the counsel had sufficient authority? In the absence of evidence, a Court will conclude that he had authority; for it is not to be presumed that counsel would enter into an agreement without authority. There is in this case evidence on both sides; but after duly considering it, I come to the conclusion that counsel had authority which would bind his client. The Defendant, it is true, objected when the arrangement was first proposed; but the question is, Did he not afterwards, impressed with the weight of his counsel's reasoning, assent?

His counsel swears that such arrangement was concluded between the parties, and Mr. Bird was present. The chairman, in passing sentence, said, "I impose a

nominal fine upon you, because you have entered into the arrangement."

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It necessarily follows, that the Plaintiff is entitled to a decree for a specific performance, with costs.

Let a proper deed be prepared, to be settled by the Master according to the agreement.

BETWEEN

JAMES SPITTAL, on Behalf of himself and all other the unsatisfied Officers, Seamen, and Crew, if any, engaged on board the Ship ROYALIST, on the Voyage hereinafter mentioned, who shall come in, &c. - - - Plaintiffs;

WESTMINSTER
HALL.
Wednesday,
July 1.

AND

WILLIAM SMITH, - - Defendant.

THE Defendant being the owner of the ship *Royalist*, which he was desirous of sending on a voyage to the *South Seas*, for the purpose of obtaining a cargo of oil and other articles, in the month of *May* 1820 engaged the Plaintiff as second mate thereof, representing to the Plaintiff that he had already engaged a person as first or chief mate thereof; and the Plaintiff accordingly, under the belief and assurance that some person would

Accounts.
Misrepresentation.

—
The Defendant engaged the Plaintiff as second mate of a vessel in the *South Sea* whale fishery, and the Plaintiff

was to have a forty-fifth share of the net produce. On the return of the ship, the Defendant paid the Plaintiff a sum of money, which he stated to be the forty-fifth share, after the customary deductions. No accounts were produced. The Defendant afterwards discovered that several deductions had been made that were not authorised by the custom of the trade.

Inquiries directed, whether the deductions made were authorised by the custom of the trade.

Held, that the bill having been filed by the Plaintiffs on behalf of himself and the others of the crew, and no case for equitable relief having been made as to the others of the crew, the bill, as to them, to be dismissed.

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go out with the ship as chief mate thereof, and that the Plaintiff, having the remuneration of a second mate, would have to perform the duties of second mate only, accordingly engaged himself as second mate of the said ship for the said voyage. And thereupon it was agreed between the Defendant and the Plaintiff, that in lieu of wages the Plaintiff should, according to the usage and custom of merchants and seamen engaged in the *South Sea* voyages, be entitled unto and receive one equal forty-fifth part or share of the clear produce of the cargo which should be obtained on such voyage remaining after the deduction of all usual and customary charges, deductions, and allowances. And accordingly certain articles of agreement to that effect, bearing date the 1st *May* 1820, was prepared by or with the privity of the Defendant, and were entered into and signed in *London* as well by or on the behalf of the Defendant as by the Plaintiff, and other the officers, seamen, and crew engaged for the voyage, and which are termed the ship's articles. (a)

The bill stated the preceding facts, and that upon the arrival of the ship at the port of *London*, the whole of the said cargo was possessed by the Defendant; and the same having been previously sold by him, the purchase-money was shortly afterwards, and on the 27th of *May* 1823, possessed and received by the Defendant. And that prior thereto, on the 2d *May* 1823, the Defendant sent for the Plaintiff to his counting-house, and informed him that he had finally settled the ship's accounts, and

(a) The share of the chief mate was to be a twenty-eighth part. The person intended to fill that office did not go; and the Plaintiff states in his bill that he did the duties of it, and claimed, in consequence, a twenty-eighth instead of a forty-fifth share; however, in the course of the argument, this claim was abandoned by the Plaintiff's counsel.

that the charges and deductions to which, under the ship's articles, the gross proceeds of the cargo were subject, amounted to the sum of 361*l.* 14*s.* 5*d.*, and the Plaintiff's share was 162*l.* 9*s.* 2*d.*; from which, after deducting the sum of 51*l.* 9*s.* 2*d.* in respect of matters therein mentioned, there remained to be paid to the Plaintiff the sum of 111*l.*; that the Defendant desired him to accept that sum, and to sign a receipt for 162*l.* 9*s.* 2*d.*; but the Defendant did not produce any account, receipt, or voucher, and the Plaintiff, being much distressed, received the said sum of 111*l.*, and signed a receipt for 162*l.* 9*s.* 2*d.*

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The bill charged, that a much greater sum was charged for casks and expenses than the Defendant ought to have charged; and, particularly, that the Defendant had improperly included amongst the alleged, usual, and customary charges and deductions, a sum of 1419*l.* 12*s.*, as being the amount of the prices of 338 tons of casks, while, in fact, 247 tons of casks only were used for the purposes of the ship and cargo; that the Defendant's charge for the casks of four guineas a ton exceeded the cost prices; and that he had also charged the sum of 248*l.* 8*s.* 6*d.* for three and a half years' interest on the sum of 1419*l.* 12*s.*, and had improperly charged insurance on both these sums, and 2½ per cent. for brokerage in addition to the 5 per cent. for commission; and the bill also charged, that the Plaintiff was induced to receive the money paid to him, and to sign the receipt, under the pressure of immediate distress, and without the benefit of legal advice; and in consequence of the representation of the Defendant, that he had fairly settled the ship's accounts, and ascertained the share of the Plaintiff to be 162*l.* 9*s.* 2*d.*, and which representations Plaintiff had since discovered to be false and fraudulent. And the bill prayed that the proper

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accounts might be taken, and the Plaintiff and crew be paid their shares; and that, in taking the accounts, the Defendant might be disallowed all payments made and claims set up by him, on account of any charges, deductions, or allowances which were not usual, customary, or proper.

The Defendant, by his answer, admitted that the Plaintiff was engaged as second mate, and in lieu of wages was to have an equal forty-fifth share of the clear produce of the cargo, which should be obtained on such voyage after the deduction of all usual and customary charges and allowances. The Defendant set forth the articles of agreement with the crew, by which the officers and seamen did promise and agree with the owner, that the price of casks should be four guineas for each ton with all other usual and customary charges, and 5 per cent. commission on amount of sales. And it was by such articles further promised and agreed by the parties thereto, that no officer or seamen should be entitled to his share until the amount of the cargo should be received by the owner or owners of the ship, (that is to say) when they should receive possession.

The Defendant admitted that, under the said articles of agreement, the Plaintiff sailed from *London*, and that the voyage was completed about the time in the bill mentioned. The Defendant further admitted, that, according to the ship's articles, and to the course and custom of the trade in the *South Sea* whale-fishery, and with the privity and approbation of the crew of the ship, the whole of the cargo was possessed by the Defendant upon the arrival of the ship at the port of *London*; and that the same, in the proper, usual, and ordinary course and mode of business in such cases, had been previously, and on the

9th *November* 1822, duly sold ; and that the purchase-money, to the amount in the whole of 11,082*l.* 15*s.*, was, on the 27th *May* 1823, duly, and in the ordinary course of business, received by the Defendant. And the Defendant denied that he did, shortly after the arrival of the ship, or at any time, send for the Plaintiff to his counting-house, and inform him that he had finally settled the ship's accounts, and that the share to which the Plaintiff was entitled of and in the clear produce of the cargo, after deducting therefrom the usual and customary charges, deductions, and allowances on account of the cargo, amounted to the sum of 160*l.*, or any other sum ; and that, after the deduction thereof of the monies due from the Plaintiff on account of advances made and slops supplied to the Plaintiff or otherwise, the balance remaining to be paid to the Plaintiff would amount to 111*l.* or any other sum. And the Defendant denied that he required the Plaintiff to accept 111*l.*, and to sign a receipt for the same, or otherwise ; or that he refused, or was asked or requested, to produce any accounts, receipts, or vouchers to enable the Plaintiff to ascertain the amount of the monies which he claimed to deduct from the gross produce of the cargo, on account of the usual and customary charges, deductions, and allowances chargeable against the cargo ; or that Defendant insisted that he had fairly settled and ascertained the amount of the Plaintiff's share in the cargo ; or that the Plaintiff was much distressed for money after so long a voyage ; or that he was unable to prevail with the Defendant to come to any further account ; or that, under the pressure of the said alleged circumstances, the Plaintiff was induced to accept, or did accept, the sum of 111*l.* or any other sum.

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The answer further stated, that the Plaintiff, being desirous to receive his money from the Defendant before

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the oil was gauged, and before the regular and due time for payment thereof, requested the Defendant to settle with the Plaintiff, on the principle of considering the oil (the quantity of which, within seven or eight tons or less, could be and then was known,) as being 230 tons of sperm oil, and ten tons of black oil. And the Defendant did accordingly agree so to settle with the Plaintiff; and that, thereupon, the Defendant shewed to the Plaintiff the account-sales of the oil, shewing the sale and the price at which it had been sold as aforesaid; and he (Defendant) then also told the Plaintiff, in the presence of the surgeon of the ship, the amount of the charges and deductions to which, under the ship's articles, the gross proceeds of the cargo are subject, such amount being 361*l.* 14*s.* 5*d.*, with which the Plaintiff expressed himself satisfied, nor did he ask for any further explanations or particulars respecting the same, which the Defendant, if requested, was then prepared, and ready and willing, to give; that he paid Plaintiff 151*l.* 5*s.* 11*d.*, which, with 11*l.* 3*s.* 6*d.* paid for him, made 162*l.* 9*s.* 5*d.*, and which, with 12*l.* previously paid in cash to the Plaintiff, exceeded by several pounds his full share. That the Plaintiff, thereupon, expressed himself perfectly satisfied; and, in the presence of the surgeon of the ship, signed and delivered to the Defendant a receipt in full, as follows: — “Received the 2d day of *May* 1823, of *Wm. Smith*, the sum of 162*l.* 9*s.* 5*d.* for the ship *Royalist*, Captain *Cook*, on a voyage to the *South Seas*. I say in full of all demands against the said ship-owner and captain. *James Spittal*, 162*l.* 9*s.* 2*d.* Witness, *M. Gaunt*.”

The Defendant admitted that he had charged the produce of the cargo with 338 tons of casks at four guineas per ton, and credited the cargo with thirty-six tons of casks, returned at the average valuation by

coopers on their arrival. Amongst the charges set forth in the schedule were

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338 tons of casks at 84s. - - £1419 12 0

3½ years' interest thereon - - 248 8 6

1668 0 6

Insurance on £1668 at £8 8s. per

cent. - - - 140 0 0

Interest on premium - - - £24 10 0

It was proved, by depositions on the part of the Plaintiff, that about 257 tons of casks were used on board the ship during the voyage for the purposes of the cargo obtained on such voyage, and about ten or twelve tons of casks were also used for other purposes of the ship and voyage. And that it is usual and customary, amongst merchants and others engaged in the *South Sea* fisheries and trade, to debit the produce of the cargo obtained on any such voyage, and as part of the usual and customary charges and deductions, with the cost prices of such quantity of casks only as is actually used for the purposes of the voyage; and that it was not usual to debit the produce of the cargo with interest on the prices of the casks, or with the insurance of them.

On the part of the Defendant, there were depositions of the surgeon of the vessel, that he (the surgeon) was present on the 3d *June* 1823, when a settlement of accounts relating to the voyage took place; and that upon that occasion the Defendant distinctly stated to the late Plaintiff, and the other parties present, the amount they would each have to receive for their respective shares of the cargo; and explained, in a general way, that the cargo, at the market-price of the day,

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was worth so much, and that the deductions and charges against the proceeds of the cargo amounted to so much; and that, in computing the amount of the share of the Plaintiff and the rest of the crew, he (the Defendant) had estimated the cargo at something above the market-price of oil. That *Humphries*, the third mate, refused to take the sum offered him by the Defendant as his share, but the Plaintiff received the sum of 162*l.* 9*s.* 5*d.* as his share, and signed the receipt for the same; and the only observation which he made upon receiving the same was, that he hoped the Defendant would make some addition to it, as a gratuity or remuneration for the Plaintiff's having acted as first mate by reason of the officer engaged as first mate not having proceeded on the voyage; upon which the Defendant asked the Plaintiff whether, after the conduct which he had pursued throughout the voyage, he was not ashamed to make such a claim, particularly in the presence of the deponent, who had witnessed the Plaintiff's irregular and unofficerlike behaviour throughout the voyage. That, upon this observation, the Plaintiff took his money, namely, the sum of 162*l.* 9*s.* 5*d.*, which the Defendant paid him, and left the counting-house with the appearance of being extremely well satisfied with the amount of what he had received from the Defendant; and that the produced receipt was dated, by mistake, in *May* instead of *June*. And deponent remembered, that it occurred to him on his return home, that he (deponent) had misdated the receipt which he had drawn for the signature of the Plaintiff on that occasion.

Mr. *Bickersteth* and Mr. *Girdlestone jun.*, for the Plaintiff. The ship went the voyage in 1820, and returned in 1823, having a cargo of oil on board, to which

the Plaintiff was entitled to a share. (They then went into some argument on the claim to the share of chief mate, which, having been subsequently given up, it is unnecessary to detail.) An instrument, which is called a receipt in full, is relied upon by the other side as a complete discharge; but, after the Defendant had given that receipt, he conceived he had not had his share, and demanded the accounts. With respect to the casks, the owner stipulated for a charge for them; but in the account he has charged for 338 tons of casks, at four guineas per ton, while the real quantity used was only 257 tons, and he is only entitled to charge to that extent. His charge for casks is 1419*l.* 12*s.*; he then charges for three and a half years' interest, 248*l.* 8*s.* 6*d.*, which is contrary to the custom of the trade. Not content with this, he has likewise charged for insurance on the casks; and the premium covers as well the interest, 248*l.* 8*s.* 6*d.*, as the price charged for the casks. The whole comes to this,—that the Plaintiff having been employed to navigate the ship to the *South Sea* for a certain share, and the ship having returned, the owner states the account to the Plaintiff, who, believing it to be correct, received his share accordingly; but that account proves to have been incorrect. It is the duty of the owner to shew that the accounts were fairly made out. He has put in unjust charges, taking advantage of the confidence placed in him. We claim for the Plaintiff a forty-fifth share, according to the ship's articles.

Mr. *Knight* for the Defendant. The Plaintiff having given up that part of the bill which claims an allowance as chief mate, the bill, as to that claim, should be dismissed with costs. The costs of the enquiries on that claim are very great. The 162*l.* 9*s.* 5*d.* was paid to the Plaintiff when he signed the receipt. Now, the Plain-

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tiff was not a common sailor, and was competent to enquire into the accounts; and if a man who has knowledge of the subject chooses to settle an account, can he afterwards complain?

The MASTER of the ROLLS. Upon the return of the ship, the Defendant settled with the Plaintiff, on the ground that he was entitled to a forty-fifth share, and that is conclusive as to the share the Plaintiff was entitled to. The bill cannot be maintained on behalf of the Plaintiff and all others of the crew, there being no case made for the others. The bill is reduced to a bill by the individual; and the account having been settled upon the ground that only the proper deductions had been made, the question is, Whether the Defendant was warranted to make the deductions he has made?

Refer it to the Master to enquire, whether the charges made for casks, interest, premiums for insurance, and provisions, are usual and customary charges in the trade of the *South Sea* whale-fishery, to be charged against the produce.

So much of the bill as claims the benefit of the office of chief mate to be dismissed with costs, reserving the payment of costs and further directions.

The bill, also, to be dismissed as to the others of the crew.

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BETWEEN

WESTMINSTER
HALL.

July 3.

WILLIAM COCKLE, Mariner, on behalf of Himself,
and all the other unsatisfied Officers and Mariners,
and Persons entitled under or by virtue of the Arti-
cles of Agreement; - - - Plaintiffs;

AND

MATTHEW WHITING and FRANCIS WHIT-
ING, - - - Defendants.

THE Defendants were joint owners of the ship *Elizabeth*; and, in August 1820, were about to send her to the *South Seas* for spermaceti, whales, or other produce of the *South Sea*, under the command of *John Samuel Parker*.

*Accounts.**Settlement.*

The master of a vessel in the *South Sea* whale-fishery, on behalf of his owners, agrees with the officers and crew, that each shall have a specified part of the net produce of the voyage. Shortly before the return of the vessel, the owners, who were entitled to a part of

Articles of agreement were entered into by and between *Parker*, as such captain, and as agent for and on the behalf of the Defendants, and the officers, seamen, and others, then on board the said ship, or who should thereafter enter on board the said ship; including, in such description, *John Inkley*, as the chief mate, and the Plaintiff as the then second mate of the said ship or vessel, whereby the said *J. S. Parker*, in his aforesaid capacity of agent for and on behalf of the Defendants,

the net produce, sell a quarter of the cargo at 52*l.* per ton, on their own account. The practice of the trade is, on the arrival of a vessel, to have the cargo estimated by a ship's cooper, and the price fixed at that given in the market on the arrival of the cargo. That mode was adopted in this case, and the Plaintiff, being apprised of it, settled accordingly.

Held, that the owners had no right to sell a part of the cargo on their own account, they being only entitled to a share of the produce; but the Plaintiff, having settled, was too late for relief in equity.

Held, also, that having settled upon the estimated quantity, although the cargo ultimately proved to amount to six additional tons, yet the Plaintiff having acted upon the estimate, he was not entitled to relief in equity.

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bound or obliged himself to pay, or cause to be paid, to the officers, seamen, and others, such shares of the net proceeds of the sales of oil, whalebone, and head-matter, or seals, or other animals or substances whatsoever, the produce of the *South Seas*, caught or taken or obtained by the said ship's company, after deducting the usual charges and expences, as were set opposite to their respective names and seals affixed thereto. And it was thereby further agreed, that *John Samuel Parker*, as the captain of the ship, should receive one twelfth lay or share of the profits of the homeward voyage, and *John Inkley* should receive one fortieth lay or share, and Plaintiff one sixtieth lay or share thereof, and that such other persons who composed the remainder of said crew should also receive the other shares or proportions therein mentioned. The bill stated, that this agreement was in possession of the Defendant, who refused to produce it. The ship sailed in *August* 1820; and returned in *November* 1823, when the vessel arrived in the port of *London*, with 266 tons and 165 gallons of oil. The bill charged, that, on the arrival of the ship in *London*, the Plaintiff and crew were in very necessitous circumstances; and Plaintiff was prevailed upon by Messrs. *Moses and Levi*, the agents of the Defendants, to accept and take the sum of 41*l.* in full of 145*l.*, and to sign some memorandum or paper-writing, purporting, as it is alleged, to be a receipt for the same; and further charged, that Defendant settled with Plaintiff and the rest of the crew at 42*l.* per ton, as the then market-price of the said oil, and actually charged the discount to the crew for prompt payment at such price: whereas Plaintiff had since discovered, as the fact was, that, whilst the ship was out at sea, the Defendant had actually sold, or contracted or agreed to sell, to some person or persons unknown to Plaintiff, a considerable part, amounting to one fourth or thereabouts, of the said

cargo, at 52*l.* per ton, and that such last-mentioned contract had since been carried into execution, and that the purchase-money had been actually paid or secured to be paid under the same, or otherwise that such contract was about forthwith to be carried into execution, and the money about to be paid under the same; and Plaintiff therefore charged, that he and the rest of the crew ought to have been permitted to have had a share in the benefit of such contract, and that the Defendants were guilty of a fraud in suppressing from Plaintiff and the rest of the crew, the fact that they had sold such one fourth of the said cargo as aforesaid at 52*l.* per ton, and in not allowing them the full benefit of such contract; and that the Defendants ought therefore, then, to be debited with such last-mentioned one fourth part of the oil at the aforesaid rate of 52*l.* per ton, and with the remaining three fourths of the cargo of oil at the rate of 42*l.* per ton, being the price at which they had admitted they actually sold such remaining three fourths of such cargo. And Plaintiff further charged, that although the Defendant then pretended, and still did pretend, that the gross produce of the cargo, after allowing discount, computing the same at 42*l.* per ton, amounted only to 10,647*l.*; yet Plaintiff charged, that the Defendants on or about the 10th of *March* 1824, made out and delivered, or caused to be made out and delivered, to *J. S. Parker*, as captain of the ship, a certain account in writing, entitled "Statement of the cargo and charges thereon ship *Elizabeth*;" and that in such account they gave him credit for 266 tons and 165 gallons of oil, which in fact, as Plaintiff charged, comprised the real quantity of the cargo. And Plaintiff further charged, that the Defendants, or their agents, in such account gave credit for the whole cargo of oil at 41*l.* 10*s.* per ton; and that, taking the same at the last-mentioned rate, they acknowledged and admitted, by

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such last-mentioned account, that the gross proceeds of the oil amounted to 11,066*l.* 3*s.* 4*d.*, exceeding by the sum of 419*l.* 3*s.* 4*d.* the amount of the gross proceeds for which they gave Plaintiff credit, although they allowed such oil to Plaintiff after the rate of 42*l.* per ton. And further charged, that *J. S. Parker* insisted by himself or his agents, after the receipt of the account, that Defendants should credit him with one fourth of the oil which had been sold by them as aforesaid, during the time the said ship was absent on her said voyage, after the aforesaid rate of 52*l.* per ton, and that the Defendants ultimately acceded thereto, and did, in fact, settle with *J. S. Parker* as such captain of the ship, and pay him for one quarter of the cargo of oil, comprising 66 tons and 250 gallons, at and after the rate of 52*l.* per ton. And further charged, that Defendants, having so settled with and paid the captain after such rate, were bound to pay Plaintiff and the other unsatisfied part of the crew in like manner, after the rate of 52*l.* per ton for one quarter of the oil, but that they refused to do so.

Plaintiff further charged, that the settlement with him ought to be declared null and void, and that the Defendants ought to set forth the accounts; and the bill prayed for an account of the dealings and transactions of the voyage, and of the monies arising from the sale of the cargo, and sums of money expended; that the former settlement might be set aside; that one quarter part of the cargo ought to be accounted for at 52*l.* per ton, and payment made to Plaintiff and the rest of the crew of what should appear to be due to them respectively.

The Defendants, by their answer, admitted the agreement in substance, and said that it was agreed and understood that the agreement, for engaging the Plaintiff and the other persons forming the crew of the ship for

the voyage, was to be in all other respects upon the terms and conditions which were usual and customary in *South Sea* voyages. The Defendants admitted the articles to be in their possession, and they admitted that the ship arrived in the port of *London* as mentioned in the bill, having on board a cargo of oil, the produce of the voyage, the quantity of which, as it eventually appeared, was 266 tons and 165 gallons. The Defendants further said, that, during the absence of the ship on the voyage, they became desirous of selling a part of the cargo expected to be brought back in the ship; but inasmuch as they considered that it would not be right or advisable to speculate with the proportion of the cargo to which the officers and seamen of the ship were entitled, especially as the price of oil had fallen about 20*l.* per ton since the sailing of the ship on her voyage, and had become lower than it had been for many years, and the officers and crew might, in the event of the price rising, be dissatisfied with such sale by anticipation, they determined to sell one fourth part only of the expected cargo as a part of their own share or proportion thereof; and they accordingly, some time before the arrival of the ship, sold such one fourth part of the expected cargo at the price of 52*l.* per ton, to be paid in bills of exchange at four months, or in money, deducting 2½ per cent. discount, at the option of the buyers, at the end of fourteen days after landing at the seller's wharf; and such was considered, and was in Defendants' instructions to the brokers employed to effect the sale expressly stated, to be made on their own account only, and as affecting their own share of the cargo only; and in case the price of oil had risen between the time of the sale and the arrival of the ship, the Defendants alone would have borne the loss arising from such sale. And the Defendants further answered, that it had become customary for the owners of such vessels,

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with the assent of the officers and seamen, to take the cargoes at the market-price at the time of the arrival of the ships, and afterwards to sell the same on their own account; and that, shortly after the arrival of the ship, Messrs. *Moses* and *Levy*, — who were generally appointed to settle the accounts between the owners and the officers and crews of ships engaged in the southern whale-fishery in respect of the cargoes, and who were appointed the agents of Defendants for the like purpose with respect to the cargo brought home by the ship *Elizabeth*, — did, according to such custom or practice, make out an account of the net value of the cargo, and of the shares thereof belonging to or due to the several officers and seamen. And Mr. *Deacon*, the cooper, who was employed to ascertain the quantity of oil brought home by the vessel, and who was a person of great skill, experience, and respectability in his business, having reported the same to amount to 260 tons, (after making by computation such allowances and deductions as were customary on the sale of such cargoes,) the cargo was estimated at that quantity, and the market-price of such oil then being estimated or taken in the account at the rate of 42*l.* per ton, and a deduction of 2½ per cent. made therefrom on account of the discount for money on the amount of the price of the oil, and the other usual charges and expences were also deducted from the same; and Defendants added, that *Moses* and *Levy* had settled accounts with the remainder of the crew in like manner, and that they had sold the remainder of the cargo at 41*l.* 10*s.* per ton; they denied that the Plaintiff was pressed for money, and also all fraud; and they alleged that oil varied in quantity according to the state of the atmosphere. The Defendants also said, that after the settlement the Plaintiff called on them, and asked to be allowed something for having acted as chief mate; when the sale of a quarter part of

the cargo, previous to the arrival of the vessel, was mentioned, and Plaintiff said he was satisfied : Defendants at the same time making him a present of 5*l*. for having acted for some time as chief mate, and upon the understanding that all accounts were settled, and that the Plaintiff should make no further claim.

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There were depositions on the part of the Defendants proving the correctness of the account, and that 42*l*. per ton was beyond the then price of oil, and that Plaintiff inspected the accounts, and appeared quite satisfied therewith.

Mr. *Bickersteth* and Mr. *Phillimore*, for the Plaintiff. By the contract, the Plaintiff, as second mate, was entitled to a sixtieth share. In the accounts made out by Messrs. *Moses* and *Levy*, the proceeds were stated at less than they really were. The Plaintiff and crew were settled with only for 260 tons, and those at 42*l*. per ton : in fact, the quantity was greater ; and a fourth part of the cargo had been sold, before the vessel arrived, at 52*l*. per ton. The Defendants allege, that it was their own share as owners which they sold ; but we contend that they had no right to sell a portion for themselves. It is true, that when the vessel arrived the oil was only worth 42*l*. per ton. The real quantity was six tons more than was accounted for, and a reason assigned for this by the defendants is, that the quantity of oil is affected by the weather ; but the crew are entitled to their shares on the quantity sold, and the money at which the cargo has been actually sold. The Plaintiff has not received his part, for he is entitled to a share of all the cargo.

The MASTER of the ROLLS. The Defendants have clearly acted by mistake ; for they were not entitled to a

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part of the cargo, but only to a part of the produce, and they are bound to account for the whole produce, and are not entitled to any advantages ; but it appears that the mode of dealing had been stated to the Plaintiff, and he settled accordingly. It is much too late for the Plaintiff now to come into equity for relief. With respect to the quantity of oil, it appears to be the custom for the cooper to estimate it. That estimate in this case was 260 tons, and it was so stated to the Plaintiff: it turned out to be seven tons more, but it might have been seven tons less ; the Plaintiff accepted and acted upon the estimate. It is too late now for the Plaintiff and crew to come into equity, when they find they have made an unprofitable speculation. The bill must, therefore, be dismissed, and with costs.

Mr. *Knight*, then referring to the unnecessary statements in the bill, and the great expences which had been incurred by enquiries rendered necessary by those statements, called upon the Court to fix the costs upon the Plaintiff's solicitor, it being sworn in the answer that the Plaintiff had declared that the solicitors had indemnified him against the expences of the suit ; and in an affidavit in a former proceeding, it was imputed to the Plaintiff's solicitors that they were to indemnify the Plaintiff in costs.

The MASTER of the ROLLS said he could not entertain it in that way — a petition must be presented.

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BETWEEN

The Earl of WINCHELSEA and VAUGHAN,
Bart., - - - - - Plaintiffs,

WESTMINSTER
HALL.

Monday,
June 29.

AND

ELEANOR GARRETTY and Others, Defendants ;

AND BETWEEN

HENRIETTA BELLINDEN and Others, Plaintiffs,

AND

VAUGHAN, Bart., and Earl of WINCHELSEA,
Defendants ;

AND BETWEEN

VAUGHAN, Bart., - - - Plaintiff,

AND

ELEANOR GARRETTY and Others, Defendants.

THIS cause came on upon exceptions : the first cause was for establishing the will, and taking the accounts of the personal estate of Lady *Essex Ker* ; and the second cause was by a cross-bill, stating that Lady *Mary Ker* and Lady *Essex Ker* were in their lifetime, as co-heiresses, seised of lands in *Scotland* ; and that they jointly and severally had contracted various debts, and given several securities for the payment of some such debts to a considerable amount ; and, amongst other such securities, they executed and gave a joint and several bond under their hands and seals to one *George Nicholls*, for securing the payment of the sum of 12,000*l.* and interest, at 5 per cent. per annum ; and a joint and several bond to *Thomas Coutts*, Esq., and others, his

Bond:
Indemnity.
Bounty.

Two ladies borrow 10,000*l.* of *Coutts* and Co. on the bond of themselves and *G. N.* ; they give a bond for 12,000*l.*, at the same date, to *G. N.* A question having arisen, whether the bond was for indemnity, or a gift for services,

or otherwise, the Court directed issues to be tried before a jury.

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partners, for securing the payment of the sum of 6000*l.* (which was afterwards found to be 10,000*l.*) and interest at the rate aforesaid; both of which bonds were executed in *England*, in the usual form of *English* bonds.

George Nicholls claimed the bond given to him before the Master, and a reference was made to enquire into the consideration of it; in which he was examined, and the Master's Report set forth that examination at considerable length, the material parts of which will be found in the arguments of counsel; and found that Lady *Essex Ker*, the testatrix in the pleadings in this cause named, employed for many years previous to her death Messrs. *Coutts* and Co. as her bankers; that the said *George Nicholls* was also for many years previous to her death the confidential friend and adviser of Lady *Essex Ker*, and in the habit of raising money to supply her occasions by procuring advances from Messrs. *Coutts* and Co., upon joining in notes and other securities with the testatrix and with Lady *Mary Ker*, her sister; that in the month of *February* 1813, a sum of 2000*l.* was borrowed from Messrs. *Coutts* and Co. by Lady *Essex Ker*, and for which sum *George Nicholls* joined in a bond, bearing date the 8th *February* 1813, as a security for the payment thereof; that in the month of *July* 1815, Lady *Essex Ker*, the testatrix, having occasion for a further loan, applied to Messrs. *Coutts* and Co., through the agency of *George Nicholls*, to advance her and her sister, Lady *Mary Ker*, the sum of 10,000*l.*; and which they agreed to do, on having the bond of Ladies *Essex* and *Mary Ker*, and *George Nicholls*, as their surety to secure the repayment thereof; and accordingly the bond stated in the charge of *George Nicholls* and Messrs. *Coutts* and Co., bearing date the 15th day of *July* 1815, was given to them. And after paying themselves the amount of all previous securities which had been given to them, the

balance of the 10,000*l.* was placed by them to the separate accounts of Lady *Essex Ker* and Lady *Mary Ker*, in the proportions each party was entitled to. That on the 15th *July* 1815, the testatrix and Lady *Mary Ker* gave to *George Nicholls* the bond stated in his charge, and in the charge of Messrs. *Coutts* and Co. for securing the sum of 12,000*l.* and interest. That, at the time such last-mentioned bond was given, Messrs. *Barclay* and *Moore* of *Lincoln's Inn* were the solicitors of the ladies; and, upon inspection of their bills, it did not appear that they were consulted, nor was any professional person present when the same was executed. The Plaintiffs had, therefore, submitted to the Master, that such last-mentioned bond was given to *George Nicholls* as an indemnity to him against his liability to pay to Messrs. *Coutts* and Co. the sum of 10,000*l.*, for which he had joined the ladies in a bond to Messrs. *Coutts* and Co., and for any future sums that he might procure for them on his responsibility; and that no consideration was paid to the obligors by *George Nicholls*.

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Several letters of *George Nicholls* were set forth in the Report, expressive of his personal inability to advance money.

And the Master also found that Lady *Essex Ker*, in and by her last will and testament, bearing date the 7th day of *September* 1819, gave and bequeathed to *George Nicholls* the sum of 2000*l.* in the following words:—"To my friend *George Nicholls*, for his services, I leave 2000*l.*;" and, upon consideration of the examination, the letters and the several circumstances thereinbefore stated, the Master was of opinion, that the bond under the hands and seals of The Right Honourable Lady *Essex Ker*, and The Right Honourable Lady *Mary Ker*, was not a bond of indemnity, but was a voluntary bond given to

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George Nicholls as a bounty by the Ladies *Essex* and *Mary Ker*, without any consideration having been paid or given by *George Nicholls* for the same.

Sir *R. W. Vaughan*, Bart., excepted, that the Master ought to have certified, that the bond was given to *George Nicholls* by way of indemnity against payments made and liabilities incurred by him on account of Lady *Essex Ker* and Lady *Mary Ker*.

And *George Nicholls* excepted, that the Master ought not to have certified that the bond was given to him (*George Nicholls*) as a bounty by the ladies, without any consideration having been paid or given by *George Nicholls* for the same, but ought to have certified that the same was given to *George Nicholls* by the Ladies *Essex* and *Mary Ker* partly for services performed by him (*George Nicholls*), and partly for money lent and advanced by him to the ladies.

Mr. *Pemberton* in support of the first exception. The Ladies *Ker* became bound to Messrs. *Coutts* for 10,000*l.*, on the 25th of *July* 1815. Another bond of the same date has been carried in: both bonds bear date the same day; the latter to Mr. *Nicholls* for 12,000*l.*; that gentleman was a surety for them to Messrs *Coutts*. The claim was resisted by the executors, they considering it to be a counter security to Mr. *Nicholls*. A reference was made to the Master to enquire into it, and an order was made that Mr. *Nicholls* should be examined. The Master has found that the bond to Mr. *Nicholls* was not a bond of indemnity, but was a bounty to Mr. *Nicholls* without consideration. Both parties have excepted to this finding: the executors against the finding that it was not indemnity; and Mr. *Nicholls* against its being a gift.

Mr. *Nicholls* in his examination has deposed to various payments made by him, that he gave up the vouchers and securities for monies due to him when the bond was given to him, and that the Ladies *Ker* meant by their bond to satisfy his services, of which they frequently spoke; and that those ladies fixed the sum of 12,000*l.* themselves, although the sum of 10,000*l.* was originally fixed upon. This appears to prove, that it was meant to be an indemnity for the like sum for which he was security in the bond to Messrs. *Coutts*. The effect of the examination appears to be, that there was no settlement of accounts when the bond was given. Our belief is, that to the extent of 10,000*l.* it was indemnity, the remaining 2000*l.* a gift.

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The MASTER of the ROLLS. How can this be settled without a jury? In a case of this sort, it is right to give the parties an opportunity to proceed at law.

Mr. *Tinney* and Mr. *Wigram* for Mr. *Nicholls's* representatives. We proceeded at law in *Scotland*. Mr. *Nicholls* is dead. Miss *Garretty*, a confidential servant, is dead; and Mr. *Moore* is dead: both of them were well acquainted with the circumstances of this case. No further evidence can be produced. The evidence now consists of Mr. *Nicholls's* examination, and some letters: there is now no evidence but what is found in the report. Every person is dead who knew any thing about it. We admit that we cannot make out any proof of monies paid; we contend that the bond was given for services: it has no reference to the bond to *Coutts*; no presumption arises that it was indemnity, — the only ground for it is, that both bonds are of the same date. Mr. *Coutts* himself advanced Mr. *Nicholls* 3000*l.* on this bond, which shows his opinion to have been that the bond was a good one.

1829.

The Earl of
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Mr. *Stuart* for Defendants in the third suit.

Mr. *Pepys*, for persons interested in the estate of the Ladies *Ker*, pressed for an issue.

The MASTER of the ROLLS. I know no instance in which a Court has decided such a case without a jury. Take these issues: —

First, Whether, at the date of the bond, the Ladies *Ker* were indebted to *Nicholls* for services by him performed or monies advanced?

Secondly, Whether the bond was an indemnity to Mr. *Nicholls* for his joining in the bond to *Coutts*, or in respect of any other engagement into which he might have entered as a surety for these ladies?

Thirdly, Whether the bond was, as to any and what part, intended as a gift to Mr. *Nicholls*? The representatives of Mr. *Nicholls* to be Plaintiffs in the first and third issues; the Plaintiffs in equity to be Plaintiffs in the second issue.

Let the jury indorse any special matter.

1829.

BEEVOR v. SIMPSON.

WESTMINSTER
HALL.

June 30.

THE Plaintiff being seised in fee of a messuage or dwelling-house and land, in *August* 1825 contracted to sell the same to the Defendant for 4500*l.*, and to deliver possession to the Defendant on the 25th *March* next, on payment of that sum. There was nothing said in the agreement with respect to the vendor making a title. The bill charged, that the Defendant had a full knowledge of the title; and that he entered into the contract with the Plaintiff with the intention and understanding that he should take and accept the title of the Plaintiff, and take a conveyance of the same from her, without requiring any other or better title thereto to be made out by the Plaintiff; and, as evidence thereof, the Plaintiff charged, that in or about the month of *March* 1818, *Henry Bevor*, doctor of medicine, since deceased, late husband of the Plaintiff, being desirous of purchasing the land whereon no buildings then stood, and which was then the property of one *Stephen Mear*, for the purpose of building a dwelling-house and offices thereon, employed the Defendant, who then was and had been for many years previously thereto, and continued to be till the death of Doctor *Bevor*, his solicitor and confidential friend and adviser, as his solicitor and agent in negotiating such purchase on his behalf with *Stephen Mear*, and in investigating *Stephen Mear's* title to the land. And that, accordingly, the Defendant did as his

Vendor and purchaser.
Specific performance.
Attorney and client.

—
A., having purchased land, left the investigation of the title to *C.* and *D.*, solicitors, in partnership. They advise that a good title can be made, and the purchase is thereupon completed. *D.*, the solicitor, was a trustee in the conveyance to bar dower. *A.* dies, and his devisee sells the property to *D.*, one of the solicitors. *D.* did not object to the title until eight months afterwards; in his answer he said, he had no recollection of the title:

Held, that a solicitor, who has been employed to advise on a title, could not, on purchasing it himself of his client, set up an objection to it, which he did not think of any importance when advising his principal.

Decree for specific performance.

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solicitor and agent, and on behalf of *Beevor*, investigate the title of *Stephen Mear* to the land; and thereupon advised him that *Stephen Mear* had a good title, both legal and equitable to the same, and did not advise him that the legal estate therein was, as the Defendant had since objected, in the heir at law of one *Mary Drinkwater*, or that there was any defect whatsoever in the title of *Stephen Mear*; and that the conveyance by lease and release was prepared by the Defendant, and to which he was himself a party, as trustee, for the purpose of preventing the attachment of dower. That the title of *Stephen Mear* was derived under the will of *Mary Drinkwater*, and was the same title to which the Defendant had made an objection; and that, in consequence of such advice of the Defendant, Doctor *Beevor* completed his contract, and built a dwelling-house and offices at the expense of 2000*l*.

The bill also charged the following facts:—That the Plaintiff was the devisee of Doctor *Beevor*; and, in entering into the contract with the Defendant, she was not assisted or advised by any other solicitor but himself.

That on the 25th of *October* 1825, the Defendant paid to the Plaintiff the sum of 500*l*. in part payment, and the Defendant never called for an abstract till *April* 1826; and, after the same was delivered to him, he agreed with the Plaintiff for some fixtures in the house, and joined with her in appointing a person to value them. The Defendant never made any objection to the title till *August* 1826. The prayer was for a specific performance.

The Defendant, by his answer, stated, that he carried on the business of an attorney in partnership with Mr. *William Rackham*; and he admitted, that he and his

partner were employed by Doctor *Beevor* as his solicitor; and although he admitted that the abstract was perused and examined in their office on the part of Doctor *Beevor*, yet he did not recollect or believe that he did himself peruse or examine the same; and if he did in fact do so, that he had no recollection whatever of the contents thereof, or of the title of the Plaintiff to the premises in the bill mentioned, or any part thereof, at the time of his entering into the agreement. Nevertheless, the Defendant said, that from the present state of the title, he believed that it appeared by the abstract received by the Defendant, that the fact was, that a good title could not be made to the premises, or to any part or parts thereof, (except the premises purchased of one *Jonathan Mitchell*), in consequence of the legal estate in the whole of such premises being outstanding. And the Defendant said, he objected to the title, that the legal estate of such parts of the premises as were purchased of *Stephen Mear* was outstanding in the heir at law of *Mary Drinkwater*, and that he had no recollection of the Plaintiff's title at the time of his (Defendant's) purchase. And the Defendant admitted, that he was a trustee of *Henry Beevor* in the conveyance to the latter for the purpose of barring dower; and that the conveyance was drawn, prepared, settled, and approved at the house of Defendant and his partner, but not, as the Defendant believed, by him, but by his partner.

The other parts of the bill were admitted in the answer. It was also charged by the bill, and admitted by the answer, that the Defendant purchased these premises for a company which he had joined for the purpose of supplying the city of *Norwich* with water; and that it was mentioned in the specifications left with the clerk of the peace, preparatory to an act of parliament, that these premises were the property of the company.

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Mr. *Bickersteth* and Mr. *Kindersley* for the Plaintiff. The question is, Whether the Defendant is entitled to a better title than the Plaintiff now has, and in particular, with respect to the legal estate outstanding in the heir at law of *Mary Drinkwater*? The Defendant has admitted, that on the occasion of the purchase by the late Mr. *Beevor*, the title was passed through the office in which he is a partner; but he endeavours to escape from the responsibility of it, by his answer, that he did not recollect that he himself perused it. If this were material, it was well met by an indisputable fact, that the Defendant was a trustee in the conveyance to the several uses and trusts, which conveyancers introduce to prevent dower from attaching to the land; and this is strong evidence that the Defendant was the particular member of the firm retained by Dr. *Beevor*, and in whom that gentleman confided. It is clear, that when the Defendant entered into the contract, he did not intend to question the title; and, in fact, never did until after the time had elapsed when he ought to have completed his contract; nor until the Plaintiff found it necessary to employ another solicitor, in consequence of the delay of the Defendant in carrying his contract into execution. The Court cannot allow a solicitor thus to act. The Defendant had accepted the title; since, in the specification deposited with the clerk of the peace, this property is stated to be the property of the intended *Normich* company, in which he was also a partner. That speculation, however, was not proceeded in, and the Defendant now found it convenient to disclaim that admission. At the time of the purchase, the Defendant well knew that Doctor *Beevor* bought the land for the express purpose of building a house upon it; and, therefore, it was doubly wrong in the Defendant, as his solicitor, to overlook an objection to the title.

Mr. *Pepys* and Mr. *Turner* for the Defendant. One of the grounds relied on by the Plaintiff, is the Defendant's situation in 1818, when Dr. *Beevor* purchased this property, as to which it is said, that the Defendant had the management of the purchase; but the Defendant by his answer has denied that he had personally any thing to do with advising Dr. *Beevor* to complete the purchase. Surely a solicitor is not bound by all the circumstances that have taken place in the office of himself and his partner as controlling his own equities. On such a principle, every counsel and solicitor who had advised on a title to property which they might subsequently happen to purchase, must, themselves, take it on the same title. It was also said, that the Defendant had done nothing up to *March* 1826; but, on the other hand, the Plaintiff did nothing, — the purchase went on as between other parties until the objection was discovered: to establish a waiver of it, there must be actual personal notice.

1829.
BEEVOR
&
SIMPSON.

The MASTER of the ROLLS. The Defendant merely denies it upon recollection.

Mr. *Pepys*. But in this case the Defendant had no actual notice; and he does not come within the proposition of a man proceeding under a contract with the knowledge of a defect. The payment of part of the purchase-money is no waiver of title, and very commonly occurs. As to the valuation of the fixtures, in purchases of land when the timber is to be valued, the valuation goes on contemporaneously with the investigation of the title. It is always assumed that a vendor shall make a good title; and unless the Court shall be of opinion that a solicitor, who has been employed eight years before on the purchase by the vendor, is bound to take a pur-

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BREVOR

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SIMPSON.

chase without any title, a decree will not be made for the Plaintiff.

The MASTER of the ROLLS.

It is not to be endured in a court of equity, that a solicitor who has been employed by a person to advise on the title to a property, should, on purchasing the same property from his client, set up an objection to the title which he did not think of any importance when advising his principal. The inference arising from the Defendant's answer is, that he was consulted, and that is supported by the circumstance of his being a party to the conveyance: it is also to be inferred, that he was perfectly acquainted with the title at the time he entered into the contract; his denial of recollection amounts to nothing.

Decree for specific performance with costs.

WESTMINSTER
HALL.

July 3.

Practice.

The Court will, on the petition of an assignee of the reversion, order the accountant-general not to transfer stock, although the petition has not been served on the assignor.

SALMON v.

MR. ROGERS for the petitioner. The prayer was, that the Accountant-General might not transfer a sum of stock without notice to the petitioner. The petition stated an assignment of the reversion of the stock to the petitioner, and there was an affidavit of the execution of the deed. The petition had not been served on the assignor.

The MASTER of the ROLLS doubted at first whether he could grant the order, unless the assignor were served;

but on *Mr. Rogers* suggesting that this was merely to prevent a fund being transferred without notice, and not an application for the fund itself, his Honour told him he might take the order.

1829.

SALMON
v.

DRURY and Another v. ATKINS and Another.

WESTMINSTER
HALL.

July 7.

THE bill was filed by persons interested in the estate of the late Admiral *Drury* against the Defendants, who were merchants and navy-agents in *London*, for an account of their various receipts and payments, as navy-agents to the Admiral, or otherwise, from 1788; and the answer set forth all these accounts and a long correspondence, but, at the hearing, the complaint was reduced to two heads:—

Navy agents.
Customs of
merchants.

By the act 59 G. 3. c. 111. navy agents are entitled to make the usual charge for passing accounts before that act; and are also entitled to charge commission on the full amount of pay, without being limited by the money actually passing through their hands. The Defendants having received 450*l.* as two and a half per cent., returned premium on 18,000*l.* in

1st, That the Defendants had charged commission on all the Admiral's pay, whether received by them or drawn for by the Admiral himself, and never having passed through their hands, and also some fees on passing accounts.

2dly, That they had received, on the 31st *October* 1814, the sum of 450*l.* on account of a policy of 20,000*l.* effected on captures, being a return premium on 18,000*l.* at 2½ per cent., which they did not then give credit for in their accounts; but which, Defendants con-

1814, without bringing it to account for many years, alleging that it awaited the final adjustment of average, referred to the Master, to enquire whether he was entitled so to retain it, according to the usage and custom of merchants.

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DEVY

v.

PEACE.

The expediency of raising the monies provided for by the term was acquiesced in by all the counsel, and the only question was, how it should be accomplished.

Mr. *Knight*, for the Plaintiff, suggested that the tenant for life and trustees should join for this purpose in destroying contingent remainders.

The MASTER of the ROLLS. Refer it to the Master to appoint a new trustee, and to approve of a demise or lease for a term of 2000 years, for the like purposes as in the will.

Only one trustee having been appointed by the will, the Master will only have to name *one*.

1829.

COLLYER v. BURNETT.

ROLLS.

July 10.

MR. *CAPRON* for the petitioner. The testator gave 9000*l.* stock, and a sum of long annuities, to his children, and, in an event which happened, to the rector and parishioners of the parish of *Lesbourne*, in *Ireland*. It is stated in the Master's report, that the event had happened; and that, by an act of the *Irish* parliament (*a*), certain commissioners were appointed for the administration of charitable funds in *Ireland*, and that this bequest came within their jurisdiction. This being a foreign charity, the Court would not administer the funds, but leave that duty to the persons to whom the same was to be paid.

Foreign charity.

The Court orders a legacy to a foreign charity to be paid over, as it will not administer the funds of a foreign charity.

Legacies to charities in *Ireland* are administered by commissioners there, under an act of the *Irish* parliament.

The MASTER of the ROLLS ordered the stock and annuities to be sold, and the produce to be paid to the commissioners.

(*a*) The act referred to is the 40 *G. 3. c. 75.*, and the proceedings under it have lately been noticed in the report of a committee of the House of Commons on the *Irish* miscellaneous estimates; and it appears, that, since 1803, the commissioners have recovered sums belonging to various charities which had been diverted from their proper purpose, to the amount of 239,707*l.* 17*s.* 10*d.*, and permanent annuities to the amount of 3853*l.* 6*s.* 9*d.* per annum.

Note. — A similar order, to the extent of the dividends only, seems to have been made in the *Attorney-General v. Lepine* (2 *Swanst.* 181.), with respect to a charity in *Scotland*; but a reason assigned there was, that the courts in that country had jurisdiction to direct the establishment of the proper charity. In the recent case of *Emery v. Hill* (1 *Russ.* 112.), Lord *Gifford*, Master of the Rolls, directed the transfer of the stock to the trustees of a *Scotch* charity, on the general

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principle stated by Mr. Capron. See, also, the case of *Minet v. Vulliamy* (given by Mr. Russell in a note to the case of *Emery v. Hill*). *The Provost of Edinburgh v. Aubrey*. (Amb. 256.) The mortmain statute 9 G. 2. c. 36., it has been decided, does not extend to money given to *Scotch* charities to be invested in land in that country. (a)

(a) *Oliphant v. Hendrie*, 1 B. C. C. 571. *Mackintosh v. Townsend*, 16 Ves. 550. See, also, *Campbell v. The Earl of Radnor*, 1 Bro. C. C. 271. *Curtis v. Hutton*, 14 Ves. 557. and 19 Ves. 309.

ROLLS.

July 17.

BASS v. CLIVLEY, Widow.

*Contract for a
loan.*

Costs.

—
A. agrees to lend B. 3000*l.* on mortgage of leasehold houses, and not to call for the title of the lessor, and advances 600*l.* in part. He then calls for the lessor's title, and files a bill for specific performance, or sale of the property to repay him the 600*l.* and interest:

Held, that he was not entitled to the title, but only to a specific performance of the contract, as proved; and that the Plaintiff, not obtaining the decree he asked, shall pay the costs.

THE bill states, that the Defendant, being in want of money, directed *William Oliver* to apply to the Plaintiff for the loan of 3000*l.*, which the Plaintiff agreed to lend for five years, at lawful interest, on having a sufficient and valid mortgage of five leasehold houses; and the Plaintiff paid him 600*l.*, when *Oliver*, as such agent, deposited with the Plaintiff one of the leases, and signed a memorandum in writing, declaring that he had received that sum for the Defendant, and that he had deposited the lease for securing the repayment thereof with interest; the remainder was to be advanced to him as soon as the necessary securities should be prepared; but the Defendant had refused to shew her lessor's title. The bill prayed, that the Defendant might be decreed to perform the agreement, and to accept or receive the sum of 3000*l.*, which the Plaintiff was willing and offered to advance, on having the whole of the principal sum secured by mortgage, according to the agreement; or that an account might be taken of what was due to the Plaintiff for principal and interest on the 600*l.*; and

that the Defendant might be decreed to pay what, on taking the account, should be found to be due to him thereon; or that the lease or leasehold premises might be sold, and the money to arise from the sale, or a competent part thereof, applied in discharge of the 600*l.* and interest; or that the Defendant might be decreed to make and execute to the Plaintiff, and to procure all proper parties to join in making and executing to him, a good and effectual assignment of the leasehold premises, by way of mortgage, for securing to the Plaintiff the repayment, with interest, of the principal sum of 600*l.*

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The Defendant, by her answer, said, that the complainant had agreed to lend and advance to her the whole of the 3000*l.* for five years, at the rate of 5 per cent. per annum, on the security of the leasehold houses and premises, it being at that time, or previously thereto, distinctly stated to the complainant by *William Oliver*, and agreed to by the complainant, that the complainant could not inspect the lessor's title to the same; and that the complainant expressly agreed to waive whatever right he might otherwise have had to such an inspection; and that he would lend and advance to the Defendant the sum of 3000*l.* upon the security of her title as lessee thereof only. And she further said, that her solicitors took all the necessary steps for evidencing her title to the leasehold houses, and did every thing that was requisite for establishing the same, and giving reasonable satisfaction thereof to the complainant. That she had always been and still was desirous to have the agreement carried into execution, which she submitted to the judgment of the Court she was entitled to have done.

On the part of the Defendant, the evidence of *William Oliver* was read, and he deposed, that in negotiating for

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the loan, he stated to the Plaintiff, that the property which he proposed to mortgage was held by her on lease direct from the owners of the freehold, and that their title could not be inspected. To which the Plaintiff replied, that if the property was of sufficient value, he would be satisfied with such security; and that a few days afterwards the Plaintiff told witness, that, in consequence of the report of the value which he had obtained from a person he had employed, he was willing to lend the Defendant 3000*l.* for five years, on this security, and that the Plaintiff expressed himself satisfied with the proposed security, without investigating the title to the freehold.

Mr. *Roupell* for the Plaintiff. We ask that the Defendant shall perform her agreement, by giving a mortgage, on receiving the difference between 600*l.* and 3000*l.* She must shew that the leases are valid leases; but she refuses to produce the landlord's title. The Plaintiff is a purchaser *pro tanto*. The master may enquire into the title, and if the Defendant shall be found to have a good one, the Plaintiff is ready to advance the whole sum. But the Plaintiff offers the alternatives, that the 600*l.* shall be repaid to him, or that the leases shall be sold.

Mr. *Knight* for the Defendant. The Defendant has always been ready to repay the 600*l.* and interest. It has been satisfactorily proved, by the depositions of the witness *Oliver*, that the Plaintiff agreed to lend the money without investigating the lessor's title to the freehold.

Mr. *Knight* then read from *Oliver's* deposition, that a Mr. *Allwood* suggested the propriety of the Plaintiff having an acknowledgment of the 600*l.*, and drew up a

memorandum, the substance of which was,—"Received of Mr. Bass 600*l.*, part of the sum of 3000*l.* agreed to be lent by Mr. Bass for five years, at five per cent. interest, to Mrs. Clivley, on the security of the five houses," and which the deponent signed.

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The MASTER of the ROLLS (after stating the prayer of the bill).

Now that there was an agreement is distinctly made out, but no such agreement as that stated in the Plaintiff's bill has been proved. The witness *Oliver* has distinctly deposed, that the Plaintiff was not to require the landlord's title; the Plaintiff, therefore, can only have a specific performance of the agreement as proved, he cannot have a decree for the sale of the property to raise the 600*l.*, nor for a mortgage for that amount. If he does not choose to have the agreement performed as proved, the bill must be dismissed with costs.

Mr. *Roupell* elected to take the decree for specific performance.

Mr. *Knight* then called His Honour's attention to the Defendant's answer, that the Plaintiff had refused to go on with the agreement, and that the Defendant was anxious to perform it.

The MASTER of the ROLLS.

Then the Defendant must have her costs. The Plaintiff does not obtain the decree he asks, that he should inspect the lessor's title. The Court is of opinion, that that was not part of the agreement; and if a Plaintiff insists upon what he is not entitled to, whilst the Defendant has been ready to perform the agreement really entered into, the Defendant is entitled to costs. It is a

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frequent practice to give costs against a Plaintiff who has a decree, — the real question being, by whose fault were the costs incurred.

His Honour then suggested, that the better way would be for the Defendant to repay the 600*l.* and interest, and have back her lease.

Rolls.

July 17.

WILLIAM BARNHAM, - - Plaintiff;

AND

RICHARD MUNN and ANN his Wife, Defendants.

*Payment of
money.*

Costs.

A. agreed to lend *B.* a loan of 600*l.* Navy five per cent. stock. He sold the stock for 522*l.*, which he paid to *B.* A bond is drawn by an unprofessional man, to repay "the sum of 522*l.*, (being the

produce of 600*l.* stock, five per cent. Navy, or such other sum as would replace the stock,) with lawful interest." A sum equal to the dividends was paid half-yearly; but *B.*, on discharging the bond, refused to transfer the stock, and would only pay the money received by her; to this *A.* objected, but at length received it, and gave up the bond, remonstrating on the injustice of the proceedings, but being told, at the same time, that the money would only be paid in discharge of the bond:

Held, that *A.* had no relief in equity; he should not have received the money, unless the party paying it had agreed that the remedy should remain open; but the costs were refused.

IN the year 1815, the Defendant, *Ann Munn*, (then, *Ann Adams*, widow,) agreed to borrow of the Plaintiff 600*l.* Navy 5 per cent. annuities, and to pay the Plaintiff the dividends thereof, until she re-transferred the stock to him. The Plaintiff sold out the stock, and it produced 522*l.*, which was paid over to *Ann Munn*, who then executed a bond for 1000*l.*, to repay to the Plaintiff the sum of 522*l.* of good and lawful money of *Great Britain*, (being the produce of 600*l.* stock, 5 per cent. Navy, or such other sum as would replace the stock,) on the 3d day of *August* 1816, with lawful interest for the same.

The bill stated, that the bond was, in order to save expence, drawn by a person not in the profession of the law, and was not, according to the terms of the agreement between the parties, which was, that the stock itself should be re-transferred; and there were various circumstances stated in the bill in confirmation of it: but Mrs. *Munn*, after paying the dividends on the stock for many years, refused to transfer the stock, and would only pay the 522*l.*, which the Plaintiff for some time refused to accept; but he, being much in want of money, at length did receive it, and gave up the bond, yet at the time of doing so he strongly protested against the illegality and injustice of the proceeding. The bill prayed, that it might be declared that the stock should be replaced, or an equivalent paid to the Plaintiff, or that a reformed and new bond might be executed to him for the difference, being 130*l.*

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Mr. *Treslove* and Mr. *Presland*, for the Plaintiff, proposed to read parol evidence of the agreement really made between the parties.

Mr. *Pepys* and Mr. *Koe*, for the defendants, objected to parol proof being received of an error in the instrument; but the objection was overruled.

Plaintiff's counsel then read depositions which proved that the agreement was as stated in the bill, and that 15*l.* had been half-yearly paid to the Plaintiff, which was the amount of the dividend on the stock sold out; and afterwards read the deposition of Mr. *Bower*, the attorney of the Defendants, as to what took place at the time the bond was discharged by the Defendants, wherein he deposed that the Plaintiff did remonstrate on the unfairness and injustice of returning the loan in money,

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but that the witness told him he could only pay him 521*l.* in discharge of the bond. That the Plaintiff at first refused to receive the money, but did, before he left the witness, take that sum and give up the bond; and Plaintiff, whilst he was receiving the money, kept uttering his complaint as to the unfairness and injustice of returning the loan in money instead of stock, or not paying him, in addition to the aforesaid sum, the difference of price when he sold out the stock for the accommodation of the Defendant, *Ann Munn*, and the then market price of the day of the same stock. That whilst the deponent was paying the money to the Plaintiff, or immediately afterwards, deponent's partner, Mr. *Lowe*, came into the room, and a conversation ensued between Mr. *Lowe* and the Plaintiff on the subject of the bond, and the amount paid in discharge of the same; when Mr. *Lowe* remarked, that the money could only be paid in discharge of the bond, and the Plaintiff reiterated his complaint of the unfairness and injustice of not replacing the stock, or paying him the difference, until he was desired to leave the room. There was no evidence that the Plaintiff was distressed for money.

The Plaintiff's counsel argued, that the loan was one of stock and not of money; that the security was intended to be to re-invest the stock; that the transaction was for years treated as a loan of stock, by the annual payment of the sum equal to the dividends, and other evidence; and that, under the circumstances in which the bond was paid and returned, there was no abandonment of the Plaintiff's claim for the difference, and that the Court would interpose to reform the instrument. (a)

(a) *Townshend v. Slangroon*, 6 Ves. 328., and *Henkle v. The Royal Exchange Insurance Co.* 1 Ves. 517.

The MASTER of the ROLLS. The question is, can the Plaintiff now sustain the suit after he has received the money? The party should not receive, unless in doing so it is stipulated that the remedy shall remain open. I am of opinion, that, upon the evidence of *Mr. Bower*, this bill must be dismissed.

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Mr. Pepys applied for costs.

MASTER of the ROLLS. I cannot give costs.

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ROLLS.

Monday,
July 13.

BETWEEN

GEORGE JACKSON, - - Plaintiff;

AND

Sir CHARLES FORBES, Baronet, THOMAS FAULKNER MIDDLETON, and CAROLINE ERSKINE his Wife, and GEORGE JACKSON JACKSON, and JOHN ANDERSON JACKSON, ANN JACKSON, and JANE JACKSON, all Infants out of the Jurisdiction, JOHN HOPTON FORBES, Administrator *ad litem* of COLIN ANDERSON the Younger, and of JANE JARVIS ANDERSON, both deceased, MATTHEW HOLE, Administrator of the Plaintiff's deceased Infant Daughter CAROLINE ANDERSON, and His Majesty's ATTORNEY-GENERAL, - Defendants.

*Will.**Construction.*

COLIN ANDERSON by his will, dated the 25th October 1802, disposed of his property as follows:

A testator, in "I desire that my house and grounds in the island of the early part of his will, gave all his property amongst his four illegitimate children, a boy and three girls, subject to such regulations and legacies as he should thereafter mention. He then says, "As the whole of this estate is to be equally divided amongst the before mentioned four children, or the survivor of them, a regular division must be made of the estate when each comes of age, or is married; and the share of such person is not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy; when the girls, or any one of them, come of age or get married, I hereby direct, that their shares may be so settled on themselves during their lives, and on their children, in equal proportions, after their deaths; that it will not be in the power of the husband, if so inclined, to injure either his wife or children." The testator then proceeds:—"Should it be the will of Almighty God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors; but in case of issue, these children are to inherit the share of their parents amongst them equally; and in case they die without issue, it is to return for the benefit of the survivors of those four children, or their families: upon the reversion of any sum to the public stock, the issue of a deceased child is to have the share which its parent would have had:

Held, that the boy, on attaining twenty-one, took an absolute interest in his share.

Held, that the daughters took for life, with remainder to their issue.

Held, that on either daughter dying without issue, her share would go to the survivors of the four children, in like manner as their original shares.

Coolabah, together with my household furniture, horses, and liquors, may be sold at public outcry to the highest bidder, and the produce placed to the credit of my estate. On the 1st of *January* 1802 I shall have assets in *India* to the amount of 19,000*l.* sterling, running on at interest with mercantile houses (therein mentioned); and I am entitled to a further division of prize money. There is one boy at home named *Colin Anderson*, born on or about the 25th *October* 1788, now at school at *Glasgow*, and boarded with Mr. *John M'Arthur* there. There is one girl in *India*, named *Jane Jarvis Anderson* (since deceased), born at *Poondamalie*, near *Madras*, on the 2d *October* 1797. There is one girl in *India*, born at *Mangalore*, on the 21st *September* 1800, named *Anne Nesbitt Anderson*, the late wife of the Plaintiff. There is

in *India*, born at *Coolabah*, on the
 (meaning the Defendant *Caroline Erskine Anderson*). To those children, or the survivors of them, and their heirs, I leave the whole of my property in equal divisions, subject to such regulations and legacies as I shall hereafter mention." The testator, then, after giving a legacy and an annuity to the mother of three of the children, and giving annuities to his father, mother, brother, and sisters, proceeds as follows:—
 "To provide for the legacies and the education of my children, my executors are hereby directed to place the whole of the estate securely at interest, either on landed property or in some public funds (those of the *India* Company, perhaps, as safe as any); but I leave the choice entirely to my executors, in whose regard for the interest of the children I have implicit confidence; and yearly, after the regular payment of the legacies and the expences of the children, any remaining balance is to be added to the principal, for the benefit of the whole. As the annuitants die, the principal producing such annuity is to revert to the common stock, for the benefit of the whole.

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As the whole of this estate is to be equally divided amongst the before-mentioned four children, viz. *Colin Anderson*, junior, *Jane Jarvis Anderson*, *Anne Nesbitt Anderson*, and , or the survivor of them, a regular division must be made of the estate when each comes of age, or is married, and the share of such person is not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy; subject, however, to the control of my executors, their heirs, or assignees, for nine years more, when he will have arrived at years of discretion, if ever. When the girls, or any one of them, become of age, or get married, I hereby direct that their shares may be so settled on themselves during their lives, and on their children in equal proportions after their deaths, that it will not be in the power of their husbands, if so inclined, to injure either their wives or children; and my executors, their heirs, and assignees, are hereby supplicated to take every possible precaution against so distressing an event. Should it be the will of God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors; but in cases of issue, these children are to inherit the share of their parents amongst them equally, and in case of their dying without issue, it is to return for the benefit of the survivors of those four children or their families: upon the reversion of any sums to the public stock the issue of a deceased child is to have the share that its parent would have had if living. But, again, if such issue die without issue, the whole of its original and after shares revert to the common stock. And I hereby constitute, nominate, and appoint my beloved brothers Lieutenant *Alexander Anderson*, *Patrick Anderson*, Lieutenant-Colonel *Lacklan M'Quarie*, and *Charles Forbes of Bombay*,

Esquire, executors of this my last will and testament." The testator afterwards made a codicil to his said will, whereby, amongst other things, he directed his house and land to be sold, and he gave various legacies to certain persons therein mentioned, and then proceeded as follows: — "Messrs. *Forbes* and Co. of *Bombay*, receive the interest half-yearly of the three notes into which the opposite sum of 32,000 rupees is divided or opposed in the name of each child at 9 per cent. per annum, until they can place it out to more or equal advantage in the funds of the Honourable *East India* Company. I wish these sums to continue accumulating until such progressively shall amount to 8000*l.* sterling, the expences of maintaining and educating these children, in the mean time, to be defrayed by me or at my expence. The reason why I have made this separate provision for these three children is, that they may be independent of me in case I should marry and have more children; but in the event of my death without an increase of family, my will will shew the manner in which I wish whatever property I may die possessed of to be distributed, including the opposite 32,000 rupees, with its interest. I have paid for a cornetcy for *Colin Anderson*, jun. in his Majesty's nineteenth regiment of light dragoons, on the 29th *September* 1802: of course, in case of my death, an equal amount of my property, with the interest from that day, will be credited to each of the girls, and the remainder then equally divided amongst the four children, or the survivors of them, agreeably to the tenour of my will.

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"1803, *January* 1. Lodged in the treasury of *Bombay* of the *East India* Company 32,000 rupees as a loan at eight per cent., the interest payable in *Bombay* half yearly, for the sole use and benefit of the under-mentioned

CASES IN CHANCERY

1829. children, and in the proportions set down opposite to
 JACKSON. their respective names.

v.
 FORBES.

<i>Jane Jarvis Anderson</i>	-	-	13,600
<i>Ann Nesbitt Anderson</i>	-	-	10,245
<i>Caroline Erskine Anderson</i>	-	-	8,155

Bombay rupees, 32,000 "

The testator died in 1804, leaving his children, the said *Colin Anderson*, *Ann Nesbitt Anderson*, *Jane Jarvis Anderson* (since deceased), and *Caroline Erskine Anderson*, the residuary legatees named in his will and codicil; and *Charles Forbes* proved the will in the prerogative court of *Canterbury*. *Colin Anderson* attained the age of twenty-one, and was of the age of thirty years when the first bill was filed on the 26th day of *May* 1819. In *May* 1819, *Ann Nesbitt* married the Plaintiff *George Jackson*, and previously thereto marriage-articles were executed, whereby the Plaintiff covenanted to vest in trustees all such monies as she might be entitled to of the estate of the testator, upon trust to pay the dividends to her for life, then upon trust for the children, as *Jackson* and wife, or the survivor should appoint; and in default of appointment, in trust for the children of the marriage, with survivorship, and accruer amongst them; and if there were no children, upon trust for such persons as the wife should by her will appoint. The original bill, in which *Mrs. Jackson*, formerly *Ann Nesbitt*, was joined with her husband as Plaintiffs, prayed that the rights of all parties in the residuary estate and effects of the testator might be ascertained, and the share of *Ann Nesbitt* transferred into the names of the trustees of the marriage-settlement, and that the dividends that had accrued due of her share might be paid to the Plaintiff.

Caroline Erskine Anderson, with the approbation of the Court, married the Defendant *J. F. Middleton*, and articles of settlement were entered into with the approbation of the Master: the Plaintiff and his wife had five children. *Jane Jarvis Anderson* died an infant unmarried. In *Easter* term, 1824, the Plaintiff and his wife filed their supplemental bill against the Attorney-General, stating the illegitimacy of *Colin Anderson* the son, and that he had departed this life without leaving any next of kin.

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Letters of administration to both *Jane* and *Colin* the son were, with the consent of the Attorney-General, granted to the Defendant *J. Hopton Forbes*. *Ann Nesbitt* died in *November* 1827, having previously made her will, whereby, pursuant to the power given to her by her settlement, she gave her property to her husband the Plaintiff in case her children should not live to attain twenty-one: the Plaintiff took administration to his wife's effects.

Mr. Roupell and *Mr. Garratt* for the Plaintiff.

The question in the case is, what interests and rights the four illegitimate children of the testator took in his residuary estate? and we submit that they took an interest for life, or, if a greater interest, that it was an interest vested, subject to be divested in the event of their dying without issue; and it is in particular the question with respect to the share of *Colin Anderson*, one of those children, we contend that he did not take an absolute interest in the fourth part of the estate of the testator, although he attained the age of twenty-one years, and that his share on his death without issue reverted to the common stock. The share of *Jane Jarvis* fell into the general fund: she died before *Colin*. In the former part of the will the testator used words which would seem

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at first to give to his son *Colin*, on his attaining the age of twenty-one, an absolute interest; but these words followed: "subject to such regulations and legacies as I shall hereafter mention." In the subsequent part of the will he says, "In case of issue, these children are to inherit the share of their parents among them equally; and in case of their dying without issue, to be divided amongst the survivors." The testator has clearly shewn his intention to be, that the interest *Colin* was to take, even in the event of his attaining twenty-one, was an interest subject afterwards to be divested, in the event of his dying without issue. Now, the mode of construing an instrument of this sort, where in the will itself there is contained contradictory clauses which cannot be reconciled, is, that the last clause shall have effect; and in this case, in the first part of the will the testator seems to have given an absolute interest, and in a subsequent part he appears to have had an intention to qualify it. The rule of construction will give effect to the latter part of the will. The rule is so laid down in Lord *Coke's* 1st *Institute*, 112 B. — "Here, by (&c.) is to be understood, as well devises of chattels real or personal, as of freehold and inheritance: also, that in one will, where there be divers devises of one thing, the last devise taketh place; *cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est.*" There may be a seeming repugnance in this will, and, upon the principle laid down in *Coke*, the latter part of the will is to prevail. In the case of *Sims and Doughty* (a), a question arose upon there being repugnant clauses in the will. The Master of the Rolls there says, "I know of no rule, but by taking the subsequent words as an indication of a subsequent intention: the Court is in a dilemma, and cannot act at all unless they do that." — In *Galland v. Leonard* (b), the Court said, "Undoubtedly, if the successive

(a) 5 *Fes.* 247.(b) 1 *Swanst.* 163.

clauses of a will are irreconcilable, the rule is to give effect to the last clause, on an idea that the testator may have altered his intention." In an early part of the will before the Court, in which it is supposed the testator may have given an absolute interest, he has qualified it by saying that it is subject to such regulations and legacies as he should thereafter mention; and the language of the subsequent part of the will limits the interest which the parties are to take. Then there is another question which arises in this case upon the codicil relative to the cornetcy, which the testator had purchased for his son *Colin*, on which we contend, that the amount of what the testator paid, together with interest from the time he advanced the payment, should also be credited in three parts to the three girls. It should be stated to the Court that a settlement was made on the marriage of the Plaintiff with *Ann Nesbitt Anderson*: that settlement has not conformed exactly to the testator's intentions; but it is not now intended to raise any question respecting it, the object of the suit being to take the judgment of the Court with respect to the interests of these parties under the will, and the events that have happened.

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Mr. *Rose* for the Attorney-General.

Sir *Charles Wetherell* appeared for Mrs. *Middleton*.

Mr. *Treslove* and Mr. *Millar* for other Defendants.

The MASTER of the ROLLS.

The interest on the 4000 rupees, the price of the cornetcy, must be calculated from the death of the testator and not from the time of payment. I am clearly of opinion that the share of the boy vested at twenty-one, and that the words of the will which apply to the survivorship are necessarily confined to the girls' shares. It

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is true that if two parts of the will are plainly inconsistent with each other, the Court is necessarily driven to adopt the latter part of the will as expressing the real intention of the testator; it must necessarily presume, where there is that inconsistency, that he meant that which he has last expressed; but the most rational rule of construction is, that it is never to be inferred, if it can be avoided, that the testator meant to make inconsistent provisions in his will; and the object of the Court is to reconcile, if it can, the whole will. Applying that principle to this will, it appears to me to have been the intention of the testator, that the boy on attaining twenty-one should take an absolute interest; but with respect to the daughters, that they should take for life only, and their issue after their deaths. The early part of the will expresses only an intention to give his whole property to these four children, subject to the regulations after mentioned. It is plain, therefore, that he did not mean to give his whole property absolutely to these four children, but that he meant to introduce some qualification of that absolute interest; and you must look, therefore, at the second part of the will in order to see what was the qualification he had in his mind in making the former part of his will. The words are, "As the whole of the estate is to be equally divided amongst the before-mentioned four children or the survivor of them, a regular division must be made of the estate when each becomes of age or is married." Now, "when each becomes of age or is married," you must apply to that expression the construction *reddendo singula singulis* when the boy comes of age, or when the girls come of age or are married, "and the share of such person is not to be considered as any longer belonging to the public stock, but to the particular person so coming of age, if a boy." The words, therefore, are express that if the particular person so coming of age is

a boy then his share is no longer part of the common stock, but becomes his absolute property. Then he introduces words, of which it is difficult to understand the meaning: "Subject, however, to the control of my executors, their heirs and assigns, for nine years, when he will have arrived at years of discretion." What sort of control a court could impose on this absolute vested gift it is very difficult to conceive. The testator has not expressed himself in a manner that would authorize any interference on the part of the Court; but the question does not arise, it being admitted that he did attain thirty. "When the girls, or any of them, become of age or get married, I hereby direct that their shares may be settled on themselves during their lives, and on their children in equal proportions after their deaths, that they may not be in the power of their husbands." Here the testator has qualified the interest of the daughters to an interest for life, giving the remainder after the life-interest of the daughters to their children. And he proceeds to state, "Should it be the will of Almighty God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors." Now, to make the will wholly consistent, this must be the meaning: if those daughters should die without issue, then the share of the daughter so dying without issue is to go amongst the survivors of the four children; and the same idea is to be pursued throughout the remaining expressions, which are to be understood in precisely the same manner. The only circumstance that created the least doubt in my mind upon this construction was this, "The share is to return for the benefit of the survivors of those four children or their families." But here, again, we must consider the construction *reddendo singula singulis* to the boy according to the nature of his original interest, namely,

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an absolute vested interest; but with respect to the daughters, according to the nature of the interest given in the original shares to the daughters and their families, and would not depend upon the daughter's surviving the person whose share should happen so to devolve to the survivor or survivors. Upon the whole, therefore, I think it very clear here that *Colin Anderson* was absolutely entitled to the original share, and to the accruing share, and that if he were illegitimate, and died without issue, it necessarily follows that the crown is now entitled.

It is impossible to make this will consistent or rational but by giving the boy a vested interest, and applying this expression with respect to the issue to the issue of the girls, and that is done without the least violence whatever: the testator meant that the daughters should take only for their lives, and that they should take it as a provision for their protection against any improper conduct on the part of their husbands, and that after their death it was to go to their children. I must declare that *Colin Anderson* took a vested interest in his original share at twenty-one. I am also of opinion, that upon the death of *Jane Jarvis*, one of the children, he took a vested interest in one third of her share, the other two daughters being then alive, and that the other two thirds of her share went to the other two daughters for their lives only; with remainder to their issue, in the same manner as the will disposes to the daughters of their original shares.

July 17.

Mr. *Roupell* and Mr. *Garratt* called his Honour's attention to a point in the minutes which the parties had not been able to settle, as to the rate of interest to be payable on what the testator had laid out in the purchase

of a cornetcy for his son *Colin*. The testator's property bore *Indian* interest for a time, and at the testator's death it was actually vested in *India*, and continued there some time afterwards.

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The MASTER of the ROLLS enquired how long the property remained in *India*; but there was no distinct evidence of the time it remained there after the testator's death: it was brought home for the purpose of being divided, and the estate was administered in this country. His Honour declared that he could not, in the absence of evidence, give more than four per cent., the interest of the Court. His Honour afterwards added, that he could not intend that if this money had not been applied to the purchase of the cornetcy it necessarily would have been employed in *India*, and have produced *Indian* interest.

The minutes of the decree, so far as they refer to the principal points of the case, are as follow: — Declare that, according to the true construction of the testator's will, *Jane Jarvis Anderson*, *Ann Nesbitt Anderson*, and *Caroline Erskine Anderson*, the three residuary legatees, who were girls, were in no event to take more than an interest for their respective lives; but that *Colin Anderson*, one of the residuary legatees, who was a boy, was to take an absolute vested interest on attaining his age of twenty-one years: declare, that while all the residuary legatees continued under age and unmarried, the residue of the testator's estate formed an aggregate fund, out of the interest whereof they were to be maintained and educated, and that the surplus interest, after paying the expences of their maintenance and education, was to be invested and added to the principal, for the benefit of the persons who should be eventually entitled thereto: and declare, that the late Defendant, *Colin Anderson*,

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upon attaining his age of twenty-one years, became absolutely entitled to one fourth part of the aggregate fund, and all subsequent interest and accumulation thereof; but in computing such fourth part, he is to be charged with the sum which the testator paid for a cornetcy for him, with interest thereupon from the death of the testator, at the rate of four pounds per cent., according to the direction of the testamentary paper relating thereto: and declare, that the remainder of the aggregate fund, after deducting such the fourth share of the said *Colin Anderson*, continued, until the death of the said *Jane Jarvis Anderson*, to be one aggregate fund, out of the interest whereof she and the two other residuary legatees (the late Plaintiff *Ann Nesbitt Jackson*, then *Ann Nesbitt Anderson*, and the Defendant, *Caroline Erskine Middleton*, then *Caroline Erskine Anderson*,) were to be maintained and educated; and that the surplus interest thereof, after paying the expence of their maintenance and education, was to be invested and added to the principal, for the benefit of the persons who should eventually be entitled thereto: and declare, that upon the death of the said *Jane Jarvis Anderson*, under the age of twenty-one years, and without having been married, the said *Colin Anderson* became further absolutely entitled to one third part of the third share, in which she had a life-interest, of and in the said remaining aggregate fund, and that the residue of such aggregate fund still continued, until the marriage of the said late Plaintiff, *Ann Nesbitt Jackson*, to be one aggregate fund, out of the interest whereof she and the said Defendant, *Caroline Erskine Middleton*, then *Caroline Erskine Anderson*, were to be maintained and educated; and that the surplus interest of such remaining aggregate fund, after paying the expence of such maintenance and education, was to be invested and added to the principal, for the benefit of the persons who should eventu-

ally become entitled thereto: and declare, that upon the marriage of the late Plaintiff, *Ann Nesbitt Jackson*, then *Ann Nesbitt Anderson*, she became entitled for her life, for her separate use, to the interest of one moiety of the said then remaining aggregate fund; and that the other moiety thereof continued till the marriage of the said Defendant, *Caroline Erskine Middleton*, then *Caroline Erskine Anderson*, to be a trust fund, out of the interest whereof she was entitled to be maintained and educated; and that the surplus of such interest, after paying the expences of her maintenance and education, was to be invested and added to the principal, so as to form an aggregate fund, for the benefit of the persons eventually entitled thereto: and declare, that on the marriage of the Defendant, *Caroline Erskine Middleton*, then *Caroline Erskine Anderson*, she became entitled for her life, for her separate use, to the interest of the said then remaining aggregate fund: and declare, that on the death of the late Plaintiff, *Ann Nesbitt Jackson*, the share of the testator's residuary estate, to the interest whereof she became entitled for her life as aforesaid, and the subsequent interest and accumulations thereof became, under the trusts of the said will and codicils, divisible, in equal shares, among her surviving children and the legal personal representatives of her deceased children, but subject as to the Plaintiff *George Jackson's* beneficial interest in the shares of his deceased children, as their father and sole next of kin, to such claims, if any, as the surviving children of the late Plaintiff, *Ann Nesbitt Jackson*, may have under her marriage-articles, as to which the Court reserves the consideration thereof until after the Master shall have made his report: and declare, that the share and interest which so vested as aforesaid in the said *Colin Anderson* deceased, with the accumulations thereof, now belong to his Majesty, subject to the payment thereof of the costs and expences

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incurred by the said Defendant, *John Hopton Forbes*, in taking out letters of administration to the said *Colin Anderson* the younger, and *Jane Jarvis Anderson ad litem*. And let the Master enquire how much of the clear residue belongs to his Majesty, and how much to the Plaintiff, *George Jackson*, as administrator, with the will annexed of his late wife, *Ann Nesbitt*, in respect of the interest and accumulations of the share to which she was entitled for her life, and how much thereof belongs to her surviving children, and the representatives of her deceased children, in respect of the principal of such share, and the interest and accumulations thereof since her death, and how much thereof belongs to the said Defendant, *Caroline Erskine Middleton*, in respect of the by-gone interest and accumulations of the share to which she is entitled for her life, and how much thereof is the principal of such share.

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WESTMINSTER
HALL.

July 11.

MRS. ANN FRANCES MIDDLETON, by her will, gave the sum of 30,000*l.*, of which 5000*l.* was lent by her on the estate of *George Johnstone*, Esq. on mortgage. A reference having been made to the Master, to enquire what was the nature of this security, he made a report thereon, of which the following is the effect:—

*Scotch heritable bond.**Heir at law.*

A. being entitled to a Scotch heritable bond, devised it with other property.

The heritable bond does not pass, but descends to the heir at law.

It is immaterial that there is also a personal obligation.

The debt still retains its real character as the *jus nobilius*.

George Grant of Leaston, in the constabulary of *Haddington* and county of *Edinburgh*, merchant in *London*, by his bond bearing date the 5th of *August* 1779, bound himself, his heirs, executors, and successors, to infest *Mary* his wife in an annuity of 500*l.* sterling, to commence at the time of his death or bankruptcy, furth of his lands of *Leaston*, *Plewland Hill*, and others therein mentioned. And by an instrument of the same date, the said *George Grant* enfeoffed his said wife in the said annuity upon his said lands. *George Grant* sold the lands to *George Johnstone*; and it was agreed that the latter should retain 10,000*l.* of the purchase-money as a capital to answer the said eventual annuity, and which sum was, by the disposition of the lands, declared to be a real burden or charge thereon; and it was therein recited that Mr. *George Johnstone* should give a personal bond, over and above making it a real burden. The said *George Johnstone*, by his bond bearing date the 2d day of *March* 1802, and registered in the books of Session 19th day of *October* 1807, after reciting the said heritable bond, became bound to pay the interest of the said sum of 10,000*l.* to the said *George Grant* during the joint lives of him and the said *Mary Grant*, or until

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she should become entitled to the annuity, and to pay the said capital sum itself to the said *George Grant*, his heirs or successors, at and upon the decease of the said *Mary Grant*; which obligation, so far as respected the principal or capital sum, was subsequently renounced and discharged by the said *George Grant*. *George Grant* and *Mary Grant*, by deed executed on the 5th of *October* 1807, and ratified by her on the same day, conveyed to *J. Cassin*, *G. Smith*, and *James Bellamy*, their heirs, executors, or assigns, the interest of the said sum of 10,000*l.*, and all the right and possession of him *George Grant* from and after the term of *Martinmas* 1807, during the joint lives of him and the said *Mary Grant*, and also the said eventual annuity of 500*l.* during the life of the said *Mary Grant*; from the decease or bankruptcy of the said *George Grant*. *George Johnstone*, by his heritable bond and disposition in security bearing date the 26th *September* 1807, registered in the books of the Court of Session the 23d of *October* 1807, bound himself to pay to the said *Cassin*, *Smith*, and *Bellamy*, and the survivor of them and his heirs, the sum of 10,000*l.* as principal, within three months after the death of *Mary Grant*, with interest from her death. He conveyed to them, in real security, the said lands, for the payment of the same sum, and interest, from the death of the said *Mary Grant*. (a) These gentlemen were trustees for *Robert Foster Grant*, Esq.; and by disposition and assignment in *April* 1809, duly registered in *May* 1809, they made over to him, his heirs and assigns, the aforesaid eventual annuity of 500*l.*,

(a) The following passage occurs in this instrument:—

“And further declaring that the aforesaid personal obligation, and the said conveyance in security, were and should be deemed consistent; and it should be competent to the said persons to operate payment by virtue either of the said securities or both, and by personal and real diligence on either or both, without innovation or confusion of rights”

payable as aforesaid, and the interest of the said principal sum of 10,000*l.* during the joint lives of the said *George Grant* and *Mary Grant*, and also the principal sum itself, payable as aforesaid, at the death of the said *Mary Grant*, and the interest thereof, and the said lands in security.

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R. F. Grant, by his disposition and assignment, bearing date the 23d day of *December* 1809, executed in *London*, and registered in the books of the Court of Session in *Edinburgh*, the 17th *February* 1810, in consideration of the sum of 10,000*l.* to him paid by the testatrix, gave, granted, alienated, and disposed to the testatrix, and her heirs and assigns, the said annuity of 500*l.* sterling, to which he had right upliftable furth of all and sundry the lands of *Leaston* and *Plewland Hills*, and other lands; and he assigned to her generally all his right in the obligation for payment. And the said *R. F. Grant* did thereby assign, convey, and dispose from him and his heirs and successors, to the testatrix, the interest of the sum of 10,000*l.* from *Martinmas* 1809, during the joint lives of the said *G. Grant* and *M. Grant*, or until she became entitled to the annuity, together with the security for the payment thereof, and the bond of *George Johnstone* surrogating and substituting the testatrix in his right and place. And *R. F. Grant* did grant, alienate, and dispose to the testatrix, her heirs and assigns, heritably all the said lands, and all the right which he had thereto, and that in real security for the payment of the said principal sum of 10,000*l.* within three months after the decease of the said *Mary Grant*, and interest from her death. And *R. F. Grant* bound himself to enfeoff the testatrix of the said lands by double enfeoffments; and for effecting the enfeoffment, he assigned to the testatrix the said sum of 10,000*l.* and interest, together with the said heritable bond and dis-

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position in security granted by the said *George Johnstone*, and the instrument of seisin following thereon, substituting the testatrix in his place; and she was afterwards duly enfeoffed. The said *George Johnstone*, then residing in *Hanover Square*, in the county of *Middlesex*, executed, in *London*, a bond or obligation, bearing date the 31st *March* 1810, unto the testatrix, to secure to her the payment of the interest of the sum of 10,000*l.* half-yearly, during the joint lives of the said *George Grant* and *Mary Grant*, or until the right of the said *Mary Grant* to the said annuity, secured by the said bond of 2d *March* 1802, took place. And in the margin of the bond is the following note or memorandum signed by the testatrix:—"15th *August* 1814. Received of the Countess *St. Antonio*, as the executrix of the late *George Johnstone*, Esq., the sum of 5000*l.* in part payment and discharge of this bond; and the further sum of 107*l.* 5*s.*, being for all interest on the 10,000*l.* to this 15th *August* 1814, and for which I have given also a stamp receipt.

(Signed) "A. F. Middleton."

Upon these facts the Master found that the sum of 5000*l.*, part of the said capital sum of 10,000*l.*, was paid off to the testatrix in her lifetime, by the Countess *St. Antonio*, the executrix of the said *George Johnstone*, in part discharge of the securities for the same; and that the interest on the remaining 5000*l.* was paid to the said testatrix or her committees by the countess, to within one quarter of the time of her death. And that, upon due consideration of the said instrument, and considering the said sum of 5000*l.* remaining due thereupon to the testatrix,—was, by the law of *Scotland*, real estate belonging to the testatrix at the time of her death, and that the same was secured by the several instruments before stated; and that as the same, by the law of *Scotland*, did not pass by the will or codicils of the testatrix, the

same was then vested in the Defendant, *Hastings Nathaniel Middleton*, as the heir at law of the testatrix, for his own use and benefit. When this cause came on for further directions, it was referred back to the Master to enquire and certify, "Whether, by the law of *Scotland*, the testatrix, either in her own name or in the names of the obligees, had a right of personal action against the obligor or his executrix, either in respect of the bond bearing date the 2d day of *March* 1802, or the bond bearing date the 26th day of *September* 1807, and to enquire whether *George Grant* and *Mary* his wife were living at the time of the testatrix's death, and if she survived her husband, and if now living, or when she died."

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The Master reported that by the law of *Scotland* the testatrix, either in her own name or in the name of the obligees, had such right of personal action in respect of either bond. That report was made upon the following opinion of *John Hope, Esq.*, the Solicitor-General of *Scotland*, and Mr. *Moncrief* of the *Scotch* bar: —

"There can be no doubt that the party in the right of an heritable bond has a right of personal action against the debtor or grantor of the bond and his executors and representatives, for payment of the sum for which the heritable security is granted. The real or heritable security is added, for the safety of the creditor, to the personal obligation of the debtor; and when a debt is so secured, important consequences follow in regard to the succession of the creditor's interest in the bond. But the circumstance that the creditor has obtained real security for the payment of his debt in no degree alters the right to demand payment in a personal action against the debtor or his representatives."

The Master also reported that it appeared by an affidavit sworn on the 18th *December* 1828, that the

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said *George Grant* was then alive; that the testatrix died on the 3d day of *November* 1823, and *Mary Grant* on the 5th of *December* 1823.

Mr. Treslove and *Mr. Bird*, for the heir at law. It seems by the opinion of the gentlemen of the *Scotch* bar that a personal action lies upon every heritable bond; the Master has found that it was real estate, and descended to the heir at law, with a right to personal action. In the case of "*Willock v. Ouchterlony*," in the House of Peers, 1772, cited in "*Glover v. Strothoff*" (a), it was affirmed by the decree of the House that heritable bonds could not pass unless they were disposed of *inter vivos* by the proper deed of disposition, according to the laws of *Scotland*; but the case to be relied on is that of "*Johnstone v. Baker*," reported in a note to the case of *The Duchess of Buccleugh v. Hoare*. (b) In that case a heritable bond was given, to a moiety of which the testator therein had become entitled; and he by his will devised all his real and personal estate upon the trusts therein mentioned. And he directed that all his property and securities for money in *Scotland* should, for the purposes of his will, be considered as personal estate, and passed to his trustees as far as he could by his will affect the same, as if the same were his personal estate in *England*. A case was laid before the Lord Advocate of *Scotland*, who thereupon stated his opinion to be, that the will of the testator was ineffectual for conveying the heritable debt in question; but that the same did, on the death of the testator, descend to his heir at law. The Master thereupon reported, that the heritable bond did not pass by the will, but descended to his heir at law. And Sir *William Grant*, Master of the Rolls, decreed accordingly. In that case also there was a right of personal action. The only case against us appears to

(a) 2 B. C. C. 33.

(b) 4 Madd. 474.

be that of *The Duchess of Buccleugh v. Hoare*. In that case an *English* bond was given, and the *Scotch* securities were only collateral; and, under the special circumstances, it was there decided that the debt was personal property. That is not the case now before the Court; and the bond, we conceive, descends to the heir at law. The third bond is an *English* bond; but that is only a bond securing the interest.

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Mr. Pepys for the administrators.

If the *Scotch* bond were given originally, then it is real estate, but if collaterally, it is not so. All the cases decide that heritable bonds as such do not pass by an *English* will. The case of *Johnstone v. Baker*, decided by Sir William Grant, related to a purchase of a heritable bond; but we are the purchasers of the 10,000*l.* Grant was unable to make a title to the estate to the extent of the annuity of 500*l.* a year granted to his wife, whereupon *Johnstone* the purchaser reserved 10,000*l.* of the purchase money, and gave a bond.

Mr. Treslove.

It was provided by the conveyance itself that the 10,000*l.* should remain in the hands of *Johnstone* as a real burden. Mrs. *Middleton* took an assignment of it by *Scotch* securities.

Mr. Pepys resumed.

The bond in 1802 was a bond to pay the 10,000*l.*: it is a mere debt, and not an interest in land. In 1807 *George Grant* assigned the 10,000*l.* to trustees for *R. F. Grant*; and in 1810 the transaction took place between the testatrix and *R. F. Grant*. Under which class of cases does this case fall? In one case it does not pass by will; in the other case, where the *Scotch* security is collateral to the debt, then it does. This being, I submit,

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within the case of the Duchess of *Buccleugh* and *Hoare*, is part of the personal estate, and passed by the will.

Mr. *Richards* followed.

It has been decided that when an *English* security is given, it passes as personal estate. Mr. *Johnstone's* executrix, the Countess of *St. Antonio*, paid off a part of the bond, and in the margin is written a receipt for 5,000*l.* in part. Now if the Countess paid off a part of this bond as executrix, there was personal liability; and having paid a portion, could the Countess have justified a refusal to pay the remainder? Mr. *Johnstone* and his executrix made themselves personally liable; and where there is that responsibility, it comes within the case of the Duchess of *Buccleugh* and *Hoare*.

Mr. *Rose* and Mr. *Lynch* for the legatees. The Master has certified that there was a right of personal action for the money against Mr. *Johnstone*. The security is a personal obligation, adding only the incident of a *Scotch* security and the enfeoffment of a heritable property; it is a personal obligation with a security binding his heir: in the case of *Johnstone v. Baker*, the parties were domiciled in *Scotland*. We are entitled to consider this as personal property of Mrs. *Middleton*, and to deal with it according to her will.

Mr. *Treslove*. This is the case of a man who does not pay the purchase money, and that in *England* is a real burthen upon the land. A bond to a man, his heirs, and successors must of necessity be realty: it is similar to a rent-charge in this country.

The MASTER of the ROLLS.

(After adverting to the bond of 1779, and the assignment to trustees for Mr. *Robert Foster Grant*), Mr.

George Johnstone executed a new heritable bond to the trustees for *Robert Foster Grant*, and in that new heritable bond he makes a real burthen on the estate, of the 10,000*l.* to be paid within a certain term after Mrs. *Grant's* death; but he does not in that security make it a real burthen upon the estate, that the interest should be paid during the joint lives of Mr. and Mrs. *Grant*.

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This heritable bond, like the former one, contains also the personal obligation of Mr. *Johnstone*.

By that disposition and assignation, which bears date two years afterwards, namely, the 3d of *May* 1809, those three trustees assign to Mr. *Robert Foster Grant* their *cestui qui trust*, the benefit of all the securities, Mr. *Robert Foster Grant* being thus entitled to all these securities, he, by a deed dated the 23d of *December* 1809, assigns all those securities to the late Mrs. *Middleton*; and she, therefore, stands precisely in the same situation as the trustees of Mr. *Robert Foster Grant* had done. Mr. *Johnstone* executed a bond to Mrs. *Middleton*, bearing date 31st *March* 1810, whereby Mr. *Johnstone* engages to pay to Mrs. *Middleton* the interest of the sum of 10,000*l.* half-yearly during the joint lives of the said *George Grant* and *Mary Grant* his wife, or until the right of the said *Mary Grant* to the said annuity, secured by the said bond of the 2d *March* 1802, took place. This was an *English* bond; and of consequence all the interest that she derived under this *English* bond would necessarily pass by her will. (His Honour here referred to the opinion of the Solicitor-General of *Scotland*, and Mr. *Moncrief*, who is now a Judge of the Court of Session.)

I have looked into the *Scotch* law upon the subject, and I now entertain a clear opinion upon it. Heri-

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table bonds, it seems, usually contain, not only a charge making the same a real burthen upon the estate, but also a personal obligation. The question to be considered is, Whether this personal obligation alters the nature of the property, so as to give it to the personal representative, in the place of its passing as a heritable bond to the heir at law? Now upon that point there is no doubt upon examining the *Scotch* authorities. It is there expressly stated, especially in Mr. *Erskine's Institutes*, that if there be a personal obligation supervening, as the term is in the *Scotch* law, the heritable bond, that the heritable bond will carry with it the personal right, as being *jus nobilius* and, consequently, it still continues a heritable bond, and will descend to the heir (a), and will not pass by an *English* will. I am, therefore, of opinion, that, except as regards the interest secured by Mr. *Johnstone's* bond to Mrs. *Middleton*, of the 31st *March* 1810, Mrs. *Middleton's* will does not affect the heritable bond; and that the right to that bond descends to the heir.

(a) Though moveable sums are rendered heritable by the creditor's securing them on land, yet an heritable debt is not changed into moveable by an accessory moveable security: *ex. gr.*, a gift of single escheat, or by a second moveable bond, corroborating the first heritable one, (*Pr. Falc.* 45.); because the supervening security is not only an accessory to the heritable debt, but it is the weaker right, which, therefore, ought not to draw the *jus nobilius* after it. And, indeed, there is no ground to presume in such case an intention in the creditor to alter the condition of the debt; for his obvious and only meaning is to secure the payment of it. Neither does the demand of payment, by a creditor in an heritable debt, though made judicially, afford any presumption of an intention to change the nature of it to moveable, but rather to employ his money, when recovered from the present debtor, upon another heritable security, more to his liking, or perhaps on a purchase of land. — *Ersk. Inst.* 186.

REPORTS OF CASES

ARGUED AND DETERMINED

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IN

The High Court of Chancery.

BURLTON and Others, Assignees, &c. v. WALL,
Clerk.

ROLLS.
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JOHN MORRIS being seised in fee of the lands in question, a commission of bankrupt, bearing date the 30th of *March* 1826, was issued against *Thomas Coleman*, the said *John Morris*, *John Beebee Morris*, and *Thomas Morris*, bankers, dealers, and chapmen, on which they were declared bankrupts, and the Plaintiffs were chosen assignees. In that character the Plaintiffs, in *July* 1827, contracted to sell the lands to the Defendant.

Bankruptcy.
Effect of superseding a commission as to one of four.

Vendor and Purchaser.

Exceptions.

A commission was issued against two partners. Subsequently a commission was issued

Previously to this commission, and on the 29th *March* 1826, a commission was issued against *Thomas*

against one of them and three other persons: this latter commission was then superseded as to the partner who was included in the first commission, without prejudice as to the other three bankrupts. The assignees under the second commission sold an estate belonging to one of the three partners; the purchaser objected, that the second commission was altogether void, but the Court held otherwise, and made a decree for specific performance.

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Coleman and one *Edward Wellings*, under which they were declared bankrupts.

On the 16th *April* 1828, *Thomas Coleman* and the Plaintiffs presented a petition to the Lord Chancellor in the matters of the two bankruptcies, praying that the commission against *Thomas Coleman*, *John Morris*, *John Beebee Morris*, and *Thomas Morris*, might be superseded as against *Thomas Coleman*, without affecting the validity of such commission as to either of the other bankrupts, or the certificate of either of them. On the 10th *May* 1828, this petition came on to be heard, when the Vice-Chancellor superseded the commission as against *Thomas Coleman*, his estate and effects accordingly, without prejudice to the validity of the commission as to the others, or their certificates; and the proofs of the debts under that commission against the separate estate of *Thomas Coleman* were ordered to be transferred to the commission issued against *Thomas Coleman* and *Edward Wellings*, and to stand part thereof. The bill stated the preceding facts, and prayed for specific performance.

The Defendant, by his answer, said, that he was ready to perform the agreement upon having a good title made to him; but he had not hitherto performed the same on account of the doubts which he was advised existed with respect to the complainant's title, especially as concerned the validity of the commission of the 30th of *March* 1826, as against the said *John Morris*, *John Beebee Morris*, and *Thomas Morris*, and their estate and effects, regard being had to the previous existence of the commission of the 29th *March* 1826, notwithstanding the said order of *supersedeas*.

The usual reference was made to the Master, who reported that a good title could be made.

To that report the Defendant excepted. The exception, and a petition of the Plaintiffs for confirming the Master's Report, came on to be heard this day.

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Mr. *Bickersteth* and Mr. *Wigram*. Here are two commissions against *Coleman*. The second commission was void from the beginning. The purchaser is a willing one, yet it is the duty of his counsel to shew, that the title is not a good one. A second commission, whilst the former is subsisting, is void, *Ex parte Bullen* (a) and *Ex parte Thompson*. (b) In the case of *Ex parte Crew* (c) the Lord Chancellor *Eldon* held, that if a joint commission issue against persons, one of whom has been declared a bankrupt under a separate commission against him, the joint commission is a nullity, one of the parties being already a bankrupt under a prior commission against him. Another question is, Can any thing subsequently done do away with the effect? *Re Coleman* (d). It has been established in a case at law, that a certificate under a second commission is not an answer to an action, *Till v. Wilson* (e); and that case was decided since the passing of the last bankrupt act. (g) The sixteenth section of that act only meant that where a commission issued against partners or others being valid, the Court might supersede it as to one, leaving it unaffected as against the others; those others being persons against whom a commission might originally have issued. If this be an invalid commission the assignees have no power to convey.

Mr. *Rose* and Mr. *Beames*. The other side contend that the second commission was void, and that nothing

(a) 1 *Rose*, 156.(b) 1 *Rose*, 285.(c) 16 *Ves.* 256.(d) 1 *Montague & M^r Arthur*, 15.(e) 7 *Barn. & Cress.* 684.; and see *Ex parte Brown*, 1 *V. & B.* 60.(g) 6 *G. 4. c. 16. s. 16.*

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could be subsequently done to make it good: but if that be law, Lord *Hardwicke* and Lord *Eldon* must have mistaken the law; for they frequently superseded the first, when a separate commission, in order to let in a second, being a joint commission. A commission of bankrupt is in the nature of an execution at law. In *Ex parte Rawson* (a) Lord *Eldon* gave effect to a second joint commission; for whatever may be the case at law, the Chancellor sitting in bankruptcy will do what is most necessary to effect the purposes of justice. If the proposition be right, that a second commission is void, then no *supersedeas* of the first could establish it; but it was decided in *Ex parte Bygrave* (b) that a joint commission against two should be superseded as to one, and that was a virtual decision that the commission was good as to the other. In *Ex parte Pryce* (c) Lord *Eldon* decided that the commissioners ought to proceed under the several commissions, since it was unknown to them which would be ultimately available.

With respect to the case of *Till v. Wilson* the sixteenth section of the last bankrupt act was not adverted to, and Lord *Tenterden* there said, "We are not called upon to decide what will be the effect of superseding the first commission; it is sufficient for the present case to say, that upon the authorities and opinions referred to, we are of opinion that the second commission is a nullity, inasmuch as there is nothing upon which it can operate, all the bankrupt's property being vested in the assignees under the first commission."

A second commission is void only by reason of the existence of the first commission; on the first being

(a) 1 *V. & B.* 160. (b) 2 *Glyn & J.* 391. (c) 2 *Glyn & J.* 161.

superseded, the second becomes good, and, therefore, this exception must be disallowed.

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Mr. *Bickersteth* in reply. The question here is, Can the Plaintiffs make a valid legal title? The Lord Chancellor may direct the proceedings of a previous commission to be impounded, and a subsequent commission to be proceeded in. And if the certificate of the bankrupt were questioned at law, the Lord Chancellor might interfere by injunction to protect the bankrupt; but that is a consideration different from what should govern the Court on the present occasion. The Plaintiff is entitled to a legal title, and is not bound to take a title which can only be protected by injunction. The second commission is invalid, and no subsequent act can establish it. The first commission is going on, and therefore the proceedings cannot be impounded.

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I am of opinion that I must make a decree for specific performance of the contract. The argument is, that the sixteenth section of the act of 6 G. 4. was intended only to apply to cases of valid commissions, and that it was not meant to apply to cases where the commission was invalid, because a prior commission had issued against one of the bankrupts. Now, if I were to give any opinion on that point, I should say that the reason of that provision in the act was for the very purpose of giving validity to the commission, which, in its origin was not valid, by enabling the Lord Chancellor to supersede the commission as to one person; and therefore I am far from adopting the argument; but, however, that might be, I should find a very great difficulty here in refusing this specific performance, for the objection is actually removed by the

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Vice-Chancellor's order under this very commission, for he superseded this commission as far as it regards *Coleman*, and the commission therefore is a good commission not only in equity, but at law. The argument used on the part of the purchaser is, that the Vice-Chancellor had no authority to do this; that the act did not apply to such a case; but I never could determine that the Vice-Chancellor had committed an error: it would in fact be a re-hearing of the Vice-Chancellor's order, and I should in such case direct the party to go to the Lord Chancellor if I entertained any doubt about it. I have no authority to reverse the Vice-Chancellor's order to supersede; and, therefore, if my opinion were otherthan it is, I could not decide in favour of the exception; all that I could do would be to send it to the Lord Chancellor; but my opinion entirely concurs with the Vice-Chancellor. I must, therefore, decree a specific performance, and indeed without any doubt upon the question, but without costs.

Exceptions overruled, and specific performance of the agreement, without costs, decreed.

Reg. Lib. A. 1828. fo. 2243.

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BETWEEN

JAMES HAUGHTON LANGSTON, Plaintiff;

ROLLS.

AND

July 28:

Sir CHARLES MORICE POLE, Bart., HAUGHTON FARMER OKEOVER, MARIA SARAH LANGSTON, CHARLES BARTER the Elder and ELIZABETH CATHERINE his Wife, and CHARLES BARTER the Younger, an Infant, by his Guardian, - - - Defendants.

THIS suit was instituted to decide a question on the will of *John Langston of Sarsden House*, in the county of *Oxford*, Esquire, bearing date the 28th July 1801, whereby he gave all his manors and lands unto and to the use of trustees upon trust, so soon as his son (the Plaintiff) should attain twenty-one years, to convey, settle, and assure the same as follows: — To the use of the Plaintiff and his assigns for life; remainder to trustees, to be named in the settlement, to preserve contingent remainders; with remainder to the use of the second, third, fourth, fifth, and every other son of the Plaintiff in tail male in succession; with remainder to testator's second and other sons successively in tail male; with remainder to trustees for 500 years, upon the trusts thereafter mentioned; with remainder to

Will, construction of. Ambiguity.

J. L., by his will, devised his manors to trustees upon trust, to convey the same to his son, *J. H. L.*, for life; with remainder to trustees to preserve contingent remainders; with remainder to the second and other younger sons of *J. H. L.* in tail male.

There was no limitation to the first son of *J. H. L.*, but the declaration of the trust of the term contained a provision to raise money for the daughters on failure of issue male of the body of *J. H. L.* The will also provided, that in case *J. H. L.* should have any children other than and besides an eldest or only son, then *J. H. L.* might raise money for the portion of younger sons or daughters:

Held, that the true construction of the will was, that the first son should have an estate tail male in reversion after the death of his father.

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the Plaintiff's daughters in succession in tail general; with remainder to trustees for ninety-nine years; with remainder to testator's eldest daughter in strict settlement, and divers remainders over. The trusts of the terms of 500 years and 99 years were declared as hereafter stated in the case laid before the Judges of the Court of Common Pleas. And the trustees were directed to give in the settlement similar powers, if any of his daughters should become tenants for life, to raise portions for their younger children. And the bill alleged that it was the testator's intention that his will should contain a direction that the settlement directed by his will to be made should contain a limitation to the Plaintiff's first son in tail male, immediately after the limitation to trustees, during the life of the Plaintiff, to preserve contingent remainders, and immediately before the limitation to the second son of the Plaintiff; and that the testator accordingly gave instructions to his solicitor to prepare a will containing a direction to insert such a limitation in the settlement so directed to be made. And in pursuance of such instructions, a draft of his will was accordingly prepared; and such draft contained a direction that such a limitation should be inserted in the will, but in the engrossment of the will executed by the testator such direction was omitted to be inserted by the mistake or carelessness of the person who engrossed the will from the draft; the Plaintiff, however, submitted that the will contained within itself sufficient evidence of the testator's intention being that the settlement so directed to be made as aforesaid should contain such a limitation as before mentioned in favour of the Plaintiff's eldest son in tail male.

The bill prayed that the will and codicils might be established, and the trusts thereof, as far as respected

the settlement and conveyance of the manors, messuages, lands, tenements, hereditaments, and real estate of the testator devised to the Defendants Sir *C. M. Pole* and *H. F. Okeover*, and their late deceased co-trustee, might be carried into execution by a settlement and conveyance to be made by the Defendants Sir *Charles Morice Pole* and *Haughton Farmer Okeover* of the same manors, messuages, lands, tenements, hereditaments, and real estate, to the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, and declarations, to, upon, for, with, under, and subject to which the same were by the will directed to be settled and conveyed, or as near thereto as the deaths of persons, or the circumstances of the case, would permit; and especially that in making such settlement and conveyance, a limitation might be inserted therein whereby the said manors, messuages, lands, tenements, hereditaments, and real estate might be limited, settled, and assured to the use of the Plaintiff's first son in tail male in remainder, immediately after the limitation to the use of trustees during the life of Plaintiff, to preserve contingent remainders, and immediately before the limitation to the use of the Plaintiff's second son in tail male.

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Sir *Charles Morice Pole* Bart. and *Haughton Farmer Okeover*, by their answers, said they believed that it was the testator's intention that his will should contain a direction that the settlement so directed to be made as in the bill mentioned should contain such limitation in favour of the eldest son of the Plaintiff in tail male, and believed that the testator accordingly gave instructions to his solicitor to prepare a will containing a direction to insert such limitation in the settlement so directed to be made; and that, in pursuance of such instructions, a draft of a will was accordingly prepared, and that such

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certain trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of his said son *James Haughton Langston* successively in tail general; with remainder to the use of other trustees for the term of ninety-nine years upon the trusts thereafter mentioned, with remainder to the use of testator's eldest daughter, *Maria Sarah Langston*, and her assigns for life, without impeachment of waste; with remainder to the use of trustees during the life of the said *Maria Sarah Langston*, upon trust to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the testator's said daughter successively in tail male; with remainder to other trustees for the term of 600 years upon the trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said *M. S. Langston* successively in tail general; with remainder to the use of the testator's daughter, *Elizabeth Catherine Langston*, and her assigns for life, without impeachment of waste; with remainder to the said trustees during the life of the said *Elizabeth Catherine Langston*, to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the said *Elizabeth Catherine Langston* successively in tail male; with remainder to the use of other trustees for the term of 700 years, upon the trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said *E. C. Langston*, lawfully begotten successively in tail general; with remainder to the use of the testator's daughter, *Caroline Langston*, and her assigns for life, without impeachment of waste; with remainder to the use of trustees during the life of

the said *Caroline Langston*, to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other son and sons of the said *Caroline Langston*, successively in tail male; with remainder to the use of other trustees for the term of 800 years, upon the trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said *Caroline Langston*, successively in tail general; with remainder to the use of the testator's daughter, *Agatha Maria Sophia Langston*, and her assigns for life, without impeachment of waste; with remainder to the use of the said trustees to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the said *A. M. S. Langston* successively in tail male; with remainder to the use of other trustees for the term of 900 years, upon the trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said *A. M. S. Langston* successively in tail general; with remainder to the use of testator's daughter, *Henrietta Maria Langston*, and her assigns for life, without impeachment of waste; with remainder to the said trustees for the life of the said *H. M. Langston*, to preserve contingent uses; with remainder to the first, second, third, fourth, fifth, and all and every other the son and sons of the said *H. M. Langston* successively in tail male; with remainder to the use of other trustees for the term of 1000 years, upon the trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said *H. M. Langston* successively in tail general; with remainder to the said testator's sixth and other daughters thereafter to be born

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successively in tail general; with remainder to the use of other trustees for the term of 1500 years, upon the trusts thereafter mentioned; with remainder to the use of Sarah, the wife of Peter Cazalet, Esq. in fee. And said testator did by his said will declare, that the said term of 500 years was upon trust that the trustees thereof *in case there should be no son of the body of his said son James Haughton Langston*, should by mortgage or sale of the premises comprised in said term, raise money for additional portions and for maintenance as therein mentioned. And said testator did by his said will declare, that the said term of ninety-nine years was upon trust that the trustees thereof, *in case there should be no son of the body of his said son James Haughton Langston*, should levy and raise such sum and sums of money for portions as therein mentioned. And said testator did by his said will declare, that the said term of 600 years was upon trust that the trustees thereof *in case there should be no son of the body of his (said testator's) said son James H. Langston*, should raise such sum and sums of money for portions as therein mentioned. And the said testator did by his said will declare, that the said term of 700 years was upon trust that the trustees thereof, *in case there should be no son or daughter of the said J. H. Langston*, should raise such sum and sums of money for portions as therein mentioned. And the said testator did, by his said will, declare that the said term of 800 years was upon trust, that the trustees thereof, *in case there should be no son of his (testator's) said son J. H. Langston*, should raise such sum or sums of money for portions as therein mentioned. And said testator did, by his said will, declare that the said term of 900 years was upon trust, that the trustees thereof, *in case there should be no son of his (said testator's) said son J. H. Langston*, should raise such sum and sums of money for portions as therein mentioned. And

the said testator did declare, that the said term of 1000 years was upon trust, that the trustees thereof, *in case there should be no son of the testator's said son J. H. Langston*, should raise such sum and sums of money for portions as therein mentioned. And said testator did, by his said will, declare that the said term of 1500 years was upon trust, that the trustees thereof, *in case there should be no son of the testator's said son J. H. Langston*, should levy and raise such sum and sums of money as therein mentioned, for the purposes therein also mentioned. And in the said testator's will is contained a power or proviso, authorizing his, the said testator's, said son *J. H. Langston*, from time to time during his life, *in case there should be any child or children of his, the said J. H. Langston's, body lawfully begotten, other than and except an eldest or only son*, to charge portions as therein mentioned. And in said will is contained a proviso, that *in case the testator's said son, James Haughton Langston, should die under the age of twenty-one years, and there should be no son or daughter of his body living at his decease ; or being such, if all such sons should die under twenty-one years of age, and all such daughters should die under that age and unmarried, then the trustees of the said will should be possessed of certain stocks or funds therein mentioned, upon the trusts therein contained.*

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The said *John Langston*, the testator, departed this life in *February 1812*, leaving the said *James Haughton Langston*, his only son and heir at law, (then a minor,) and several daughters, him surviving, having previously made three codicils to his said will, the last of which bears date in *December 1811*, but none of them making the least variation, or in any manner affecting the above-mentioned limitations of his real estates.

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The said *James H. Langston* attained the age of twenty-one years in *May* 1817, and has since that time intermarried, and has issue by his wife two sons, viz. "*Henry Langston, his eldest or first born son, and Edward Langston, his second born son.*"

In *Easter* term 1827 the case was argued before his Majesty's Justices of the Court of King's Bench, by Mr. *Shadwell*, for the Plaintiff, and Mr. *Horne*, for the Defendants; and they (after having considered the same) certified that they were of opinion that the said *Henry Langston*, the first son of the said *James Haughton Langston*, did not take any estate under the said will.

After this certificate of the Judges of the King's Bench, the cause came on to be heard before Sir *John Leach*, who had then become Master of the Rolls, on the 17th *March* 1828, Mr. *Pepys* and Mr. *Knight*, for the Plaintiff; Mr. *Horne* and Mr. *Wray*, for the Defendants, except the trustees; Mr. *Purvis*, for the trustees. His Honour directed a case to be made for the opinion of his Majesty's Justices of the Court of Common Pleas; and it was ordered that the question should be, "*Whether Henry Langston, the first son of the testator's son James Haughton Langston, takes any and what estate under the said testator's will?*"

James H. Langston had not in fact any sons, and the statement that he had sons was made in both cases, in order to raise the question at law.

A case was accordingly stated, which set forth the will much more fully than it was stated in the case laid before the Court of King's Bench; to insert it here would perhaps be considered unnecessary, and

therefore only some of the amplifications will be noticed.

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This case thus begins: — “*John Langston, Esquire*, was, at the time of making his will hereinafter mentioned, and at his death, seised in fee simple of divers manors, messuages, lands, tenements, and hereditaments, situate in the counties of *Oxford* and *Middlesex*, and duly made and published his last will and testament in writing, bearing date the 28th *July* 1801, which was executed and attested in the manner by law required to pass freehold estates by devise; and he thereby gave and devised all his manors, messuages, farms, lands, tenements, and hereditaments, situate and being in the several counties of *Oxford* and *Middlesex*, or elsewhere in *England*, except his shares in the *New River Company*, unto *John Pollexfen Bastard, Esquire, John Williams Hope, Esquire, and Charles Morice Pole, Esquire*, (now *Sir C. M. Pole, Bart.*) their heirs and assigns, to the uses after mentioned (that is to say) to the use of the said testator’s son, the said Plaintiff *James Haughton Langston*, for and during the term of his natural life, without impeachment of waste;” with remainder to the uses stated in the former case, set out much more fully.

In this case the trusts of the several terms of years limited by the will are set out so much more extensively than they were in the former case, that it has been deemed necessary to make some extracts, first with regard to the term of 500 years; “and the said testator by his said will did declare that as for and concerning the said term of 500 years by his said will limited as aforesaid, the same term was limited unto the said trustees thereof, their executors, administrators, and assigns, upon trust that in case there be no son of him the said Plaintiff, *James Haughton Langston*, nor no future son of his the said

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*testator's own body, or there being any such son or sons, if he and they should all die without issue male before any of them should attain the age of twenty-one years, and there should be two or more daughters of the body of his the said testator's said son, the said Plaintiff J. H. Langston, then they the said trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, should after the decease of his (the said testator's) said son, the said Plaintiff James H. Langston, and such failure of issue male of his body and of his the said testator's own body as aforesaid, by mortgage or sale or other disposition of all or any part of the premises comprized in the said term of 500 years, or by the rents and profits thereof, or by any ways or means whatsoever, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters (other than and besides an eldest or only daughter) as thereafter mentioned (that is to say) [In trust to raise portions for daughters as therein mentioned] and containing also the following passage: — " But nevertheless the payment of the same portion or portions shall be postponed until the end of twelve calendar months next after the decease of him my said son, and failure of issue male of his body and my body as aforesaid ; and then the portion or portions shall be payable with interest for the same, after the rate of 4*l.* by the year for each sum of 100*l.* from the time of the commencement of the said term of 500 years in possession."*

The trusts of the term of ninety-nine years were declared to be, that in case there should be *no son or daughter of the body of the Plaintiff, nor no future son of testator's body*, or there being any such sons or daughters, the sons should die without issue male, and the daughters without issue before they attained their ages of twenty-one years, *then after the decease of the Plaintiff and failure*

of issue as aforesaid, to raise sums for the benefit of testator's youngest daughters therein named, and as therein mentioned. The trusts of the term of 600 years are to be carried into execution in the same events, with this in addition; "and in case there should be no son of the body of his daughter Maria Sarah Langston, or there being any such son or sons, if he and they should all die without issue male, before any of them should attain the age of twenty-one years, and there should be two or more daughters of his daughter M. S. Langston, then after the decease of Plaintiff and M. S. Langston, and such failure of issue as last aforesaid, to raise portions for her daughters as therein mentioned."

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The provision for younger sons, as set forth in the second case, is in the following words: —

“And the said testator thereby also provided and directed, that it should be lawful for the said Plaintiff from time to time during his natural life, in case there should be any child or children of his body lawfully begotten *other than and besides an eldest or only son*, by any deed or deeds, instrument or instruments in writing, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, with or without power of revocation, or by his last will and testament in writing, to be by him signed, sealed, and published in the presence of and attested by three or more credible witnesses, to charge all or any part of the said manors, messuages, farms, lands, tenements, tithes, and hereditaments thereinbefore devised, with and for the raising and payment of any principal sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.*, for the portion or portions of any one, two, or more of the younger son or sons, or daughter or daughters of the body of him the said Plaintiff, lawfully to be begotten, born in

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his lifetime, or within due time after his decease, to be paid and payable unto and to vest in such younger son or sons, or daughter or daughters respectively, at such time or times and in such shares and proportions, with such clauses of survivorship, and in such manner as he the said Plaintiff should by such deed or deeds, instrument or instruments in writing, or last will and testament, to be executed and attested as aforesaid, direct, limit, and appoint. And also to charge the same premises, or any part thereof, with or for the payment of any sum or sums of money yearly or otherwise, as he should think fit, for the maintenance of *such younger son or sons, or daughter or daughters*, from the time of his death until such portion or portions respectively should become payable, not exceeding the interest of such portions after the rate of 4l. per cent. per annum."

In *Michaelmas* term 1828, this case was argued before His Majesty's Justices of the Court of Common Pleas, by Mr. Serjeant *Taddy* for the Plaintiff, and Mr. Serjeant *Wilde* for the Defendants, and those Judges (after having considered the same) certified that they were of opinion, that the said *Henry Langston*, the first son of the said testator's son *James Haughton Langston*, took an estate in tail male under the said will expectant on the decease of his father the said *James Haughton Langston*.

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The cause now coming on to be heard on further directions,

Mr. *Bickersteth* and Mr. *Wray* for the Defendants, except the trustees. The Courts of King's Bench and Common Pleas have found differently. The question is on the devise to the testator's son for life, with remainder to that son's second and other sons, wholly omitting the first son. The testator then goes on to provide for his daughters by terms of years, and that

provision is made in certain events ; and by his will he declares the trusts of the term to be, that in case there shall be no son of the Plaintiff, nor no future son of his own body, or there being any such son or sons, if he and they shall all die without issue male before any of them shall attain the age of twenty-one years, and there shall be two or more daughters of the body of the Plaintiff, then certain sums shall be raised ; so that he has made a provision for the Plaintiff's daughters on failure of issue male. The argument on the other side is, that the testator could not have meant to exclude the eldest son. Afterwards there is a provision for the children other than the eldest son. Now, these are the clauses in the will by which it will be attempted to make out that the eldest son was intended to be included in the limitation. But can the Court consider the latter clauses so repugnant to the first limitation, that it will introduce a limitation to the eldest son? The proviso for the daughters is consistent with no benefit to the eldest son. It is nothing that no other provision is made for the eldest son, the will must be construed by itself. The Court of King's Bench has held that the eldest son took nothing: the Court of Common Pleas has held the contrary: it rests with this Court to decide. The words used by a testator are the words on which alone the Court can act ; it cannot enter into conjecture.

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Mr. Pepys and Mr. Knight for the Plaintiff.

Mr. Purvis for the trustees.

The MASTER of the ROLLS.

Whatever may be my opinion on the subject, I shall certainly come to a decision, in order that the cause may be carried to the House of Lords. I shall, therefore,

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determine in favour of the decision of the Court of Common Pleas; but my opinion is, that that Court came to a right conclusion. The whole will must be looked through in order to discover the sense of the testator; and the question is, whether the testator or the drawer of the will did not by mere mistake omit the word "*first*." I am of opinion that it was omitted by mistake. How is the provision for the daughters, in case there should be no issue male, consistent with no limitation to the first son? It is manifest, that the testator did not mean to exclude the first son. Then follows another clause, but a stronger inference cannot be drawn. The testator, contemplating there might be several sons, gave his son a power to provide for his younger sons; yet, according to the argument, the second and other younger sons were to take the whole estate.

My opinion, therefore, is in favour of the decision of the Court of Common Pleas.

The will must be decided on according to the sum of the expressions throughout it.

Decree, a conveyance to be executed, whereby an estate tail male is to be limited to the first son of the Plaintiff, after the limitation to the trustees during the life of the Plaintiff to preserve contingent remainders.

Reg. Lib. B. 1828. fol. 2069.

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CHRISTOPHER TOPHAM *v.* ANN CONSTANTINE.ROLLS.
July 28.

THIS was a bill filed by the Plaintiff against the Defendant, as administratrix of Mr. *Richard Constantine*, for the specific performance of an agreement for sale of an estate by the Plaintiff to the intestate. The bill had been amended by a charge that the title had been accepted, and that the Defendants were not entitled to a reference of title; but the prayer of the bill remained as when it was first filed, and did not pray that it might be decreed that the Defendant had accepted the title.

Vendor and purchaser.

The Plaintiff is entitled, under a prayer for general relief, to such remedy as the statement of his case entitles him to.

Where an estate has been sold to a person who has since died, the Court will direct an account to be taken of the personal estate, and decree that the vendor shall have a lien on the land for so much as the personal estate will not extend to pay.

It was objected, therefore, that such a decree could not now be made; but

The MASTER of the ROLLS decreed that the Plaintiff was entitled, under the prayer for general relief, to such remedy as the statement of his case entitled him unto, and His Honor decreed a specific performance.

The Plaintiff's counsel, also wished to have it decreed that he had a lien on the estate for what remained due of the purchase-money; but *His Honor* decreed that the Master should take an account of the personal estate of the purchaser, and ascertain the clear residue thereof applicable to the payment of the purchase-money; and if there was not sufficient, the Plaintiff was to have a lien on the land sold, for so much as should not be paid out of the personal estate.

Reg. Lib. B. 1828. fol. 2319.

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BETWEEN

Rolls.
July 21.WILLIAM PHILLIPS and ELIZABETH his
Wife, - - - Plaintiffs;

AND

GEORGE PARKER, JOHN ULLETT, JOHN
HURN DOVE, HENRIETTA DOVE, Widow,
HENRIETTA DOVE, Spinster, and SARAH
DOVE, - - - Defendants.

Will.

Construction.

Devise of lands, subject to 1000*l.* to be raised for the testator's daughters, to an annuity of 5*7**l.* 10*s.* to his widow, and to all such incumbrances as might happen to be thereon, does not exempt the personal estate from the payment of a mortgage thereon.

JOHN DOVE, by his will dated the 23d of *June* 1818, duly executed and attested, as by law is required for the devise of freehold estates after reciting that he had, for the advancement and preferment in life of his two sons *Hargate Dove* and *William Dove*, made ample provision and settlement for them, and that he therefore did not consider it requisite to make further provision for them, gave and devised unto his son *John Hurn Dove*, his heirs and assigns, *subject to the payments thereafter mentioned, and to all such incumbrances as might happen to be thereon*, all that his freehold and copyhold estate, late *Thomas Edwards'*, situate and being at *Cawthorpe* in the parish of *Bourn*, and other lands which the testator purchased of *John Willoughby* and others, and also all those freehold and copyhold lands lying in the *South Fen of Bourn* aforesaid, at a place called *Coat Hills*, subject nevertheless to the payment thereof, within twelve months next after his decease, of the sum of 1000*l.* of lawful *English* money, in equal shares and proportions, unto his three daughters, the Plaintiff *Elizabeth Phillips*, *Henrietta Dove*, and *Sarah Dove*; and also to the payment of the sum of

37l. 10s. yearly, and every year, unto his the testator's wife *Henrietta Dove*, as an annuity for and during the term of her natural life, to be paid as thereafter mentioned; to hold all and every the said messuages, lands, hereditaments, and premises, subject as aforesaid, unto his son *John Hurn Dove*, his heirs and assigns; but in case *John Hurn Dove* should die without leaving any lawful issue of his body, or leaving such issue, he, she, or they should happen to die under age without leaving the like lawful issue, then the testator gave and devised all and every the same estates so given and devised unto his said son, unto his daughters the Plaintiff, and the said *Henrietta Dove* and *Sarah Dove*, their heirs and assigns, as tenants in common, and not as joint tenants. And he gave and devised unto his two friends, *George Parker*, Esq. and *John Ullett*, Esq. certain freehold and copyhold houses and lands, and all other his freehold and copyhold estates not thereinbefore given and devised unto his son *John Hurn Dove*, to hold all and every part thereof as were freehold, unto the said *George Parker* and *John Ullett*, their heirs and assigns, upon trust, as soon as conveniently might be after his decease, to sell and absolutely dispose of the freehold part of such estate for the most money and best price or prices that could be had or gotten for the same, either together or in parcels, by public auction or otherwise as they might think proper; and as to the copyhold or customary part of such last described estates, he thereby authorized and empowered, or decreed and directed, the said *George Parker* and *John Ullett*, as soon as conveniently might be after his decease, to make sale and dispose of the same either together or in parcels, by public auction or private sale as aforesaid, to and for the best price or prices that could be had or gotten for the same; and all his horses, beast, sheep, cattle, corn,

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grain, hay, straw, implements of husbandry, debts, money, and receipts for money, and all other his personal estate and effects, of what nature or kind soever and wheresoever the same might be, and not otherwise thereby given and disposed of, he gave and bequeathed unto the said *George Parker* and *John Ullett*, upon trust, to sell and dispose of such part or parts thereof as should not consist of money or securities for money, as soon as conveniently might be after his decease; and out of the monies arising from the sale thereof, after paying all his just debts, funeral expenses, legacies, and the expenses attending the provisions of that his will, first pay unto each of his daughters *Henrietta Dove* and *Sarah Dove*, the sum of 1500*l.* a piece; and from and after payment thereof, then upon further trust, to pay the residue or surplus thereof in equal shares and proportions unto his said daughters *Henrietta Dove* and *Sarah Dove*, and the Plaintiff *Elizabeth Phillips*, their executors, administrators, or assigns; and he gave and bequeathed the same to them, together with their shares of and in the sum of 1000*l.*, thereinbefore directed to be paid to them by his said son *John Hurn Dove*, to be paid by his executors in trust within twelve months after his decease: and he gave and bequeathed unto his said wife all his household goods and furniture, plate, linen, woollen, kitchen, brewing, and dairy utensils, or such part thereof as she might think proper to make choice of, subject to the wear and tear thereof, for and during the term of her natural life, and from and immediately after her decease, he gave and bequeathed the same unto his said son *J. H. Dove*, his executors and administrators. The testator appointed the said trustees executors of his will.

The Plaintiffs, by their bill of complaint, claimed to be entitled under the will to have one third of the sum

of 1000*l.* raised and paid out of the estates specifically devised to *John Hurn Dove*, and that they were also entitled to one equal third part of the residue of the said testator's estate and effects. And the bill charged, that *John Hurn Dove*, notwithstanding he claimed an interest in the freehold and copyhold estates of the testator as heir at law and customary heir, also claimed to be entitled to have the estates devised to him by the testator's will exonerated from all charges and incumbrances thereon, and especially from a sum of 3000*l.* and interest, charged thereon by way of mortgage.

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The bill prayed that the will might be established, and the trusts thereof performed and carried into execution, by and under the direction and decree of the Court; and that it might be declared that *John Hurn Dove* was not entitled to have the estates devised to him by the will, subject to the incumbrances thereon as aforesaid, exonerated and discharged from the mortgage of 3000*l.* and interest, or other the incumbrances on or affecting the same. And that in case the mortgage for 3000*l.*, or any other of the incumbrances on or affecting the estates devised to the said *John Hurn Dove*, should be paid or satisfied out of the personal estate of the testator, or any other part of his estate other than the estate subjected thereto as aforesaid, then that the same might be decreed to be made good out of the estate so devised to *John Hurn Dove*, and that the same might be raised by sale or mortgage of such last mentioned estates; and that the Defendant *John Hurn Dove* might be decreed forthwith to pay to the Plaintiffs, or to the Plaintiff *William Phillips*, in right of his wife, and to the Defendants *Henrietta Dove*, spinster, and *Sarah Dove*, in equal shares and proportions, the sum of 1000*l.* by the will bequeathed to them, and charged on and made payable out of the estates specifically devised by

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the will to *John Hurn Dove*, together with interest thereon from the end of twelve calendar months after the testator's decease; and that, if necessary, the 1000*l.* and interest might be raised by sale or mortgage of the last mentioned estate, or a competent part thereof.

John Hurn Dove, by his answer, insisted that he was entitled to have the hereditaments devised to him exonerated from the principal money (3000*l.*) due upon the said mortgage, and the interest due and to grow due thereon, and to have such principal money and interest paid out of the testator's assets.

It was on this point in the answer, that the case was discussed at the hearing.

Mr. *Pepys* and Mr. *Younge* for the Plaintiffs. The estate devised to the Defendant *John Hurn Dove*, is devised *cum onere*. This case differs from *Searle* and *St. Eloy*, and other cases which may be cited, inasmuch as the testator in the present case devised his estate, not merely subject to the incumbrances thereon, but subject to the incumbrances which might be thereon at the time of his decease, evidently intending to charge the devised estate for the purpose of increasing his personal estate. If the devisee of the estate be entitled to have it exonerated from the mortgage, the effect will be wholly to defeat the testator's intentions with respect to his personal estate, and deprive the parties interested in the personal estate of the provision intended for them. If the testator's intention can be regarded, no possible doubt can arise in this case.

Hancox v. Abbey (a) was cited for the Plaintiffs.

(a) 11 *Ves.* 179.

Mr. *Norton* in the same interest.

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Mr. *Barber* for the heir at law. The mortgage is one of the testator's own creation, and a devise subject to a mortgage does not exonerate the personal estate. A devise of an estate subject to a mortgage is no more than would have been implied, and is not an exoneration of the personal estate from the payment of the mortgage. He cited the cases of *Howell v. Price* (a), *Searle v. St. Eloy* (b), *Bartholomew v. May* (c), *Galton v. Hancock* (d), *Tweedale v. The Earl of Coventry* (e), *Barnewall v. Lord Cawdor* (g).

Mr. *Pepys* in reply. The testator devised the estate subject to 1000*l.* and other incumbrances; that 1000*l.* he gave by his will, and the estate must be held subject to that sum and to the mortgage. The estate being also in the same passage subject to the incumbrances which may be thereon, it is necessarily subjected as well to the mortgage as to the 1000*l.*

The MASTER of the ROLLS. The words are "subject to the payments thereafter mentioned, and to all such incumbrances as might happen to be thereon." The personal estate is the primary fund for the payment of debts, and there must appear a clear intent on the part of the testator to exempt that fund; it has been repeatedly decided, that a devise subject to a mortgage does not exempt the personal estate. This devise is subject to the payments thereafter mentioned, and the incumbrances that may be thereon. Now, the sums

(a) 1 *P. W.* 295.

(c) 1 *Atk.* 487.

(e) 1 *B. C. C.* 240.

(b) 2 *P. W.* 386.

(d) 2 *Atk.* 427.

(g) 3 *Mad.* 453.

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after mentioned are 1000*l.* and an annuity; it is hence attempted to be inferred, that the land must also bear the mortgage, but there is nothing in this case to distinguish it from the cases cited. Declare the personal estate liable in the first place.

By the decree it is declared, that the Defendant *John Hurn Dove* is entitled to have the estate devised to him by the will of the testator exonerated and discharged from the mortgage of 3000*l.* and interest. The usual accounts to be taken of the personal estate. The personal estate to be applied in payment of debts in a due course of administration. Accounts to be taken of the freehold and copyholds. Estates devised in trust for sale. Further directions and costs reserved.

Reg. Lib. B. 1828. fol. 2309.

Note.—It is a general rule, that personal estate is first liable to the payment of mortgages in exoneration of the real estate mortgaged, (*King v. King*, 3 *P. W.* 359.; *Bartholomew v. May*, 1 *Atk.* 487.; *Searle v. St. Eloy*, 2 *P. W.* 386.); and next, the real estate descended is liable (*Galton v. Hancock*, 2 *Atk.* 425.), unless the debts are directed to be paid out of the lands devised (*Manning v. Spooner*, 3 *Ves.* 115.) and unless there be also a clear intention that the descended estates should not be subject to the payment of the debts (*Barnewall v. Lord Cawdor*, 3 *Mad.* 455.) If there be a declaration, express words, or clear manifestation or indication upon the face of the will, that the personal estate is to be discharged from the payment of debts, the Court will not disappoint the intention, (*Ancaster v. Mayer*, 1 *Bro. C. C.* 462.; *Oneal v. Mead*, 1 *P. W.* 695., and *Bootle v. Blundell*, 1 *Mer.* 193.; *Watson v. Brickwood*, 9 *Ves.* 447.) The personal estate of a son, on whom lands in mortgage descended, is not liable to the payment of the mortgage monies (1 *Ab. Eq.* 270.) And the personal estate of a devisee of lands mortgaged by the devisor or his ancestors, is not liable to the payment of the mortgage money, (*Shafto v. Shafto*, 2 *P. W.* 664. note; *Lawson v. Hudson*, 1 *Bro. C. C.* 58.) The personal estate of the purchaser of an equity of redemption has been held to be not liable to the mortgages, (*Forrester v. Leigh*, 2 *P. W.* 664. note; *Tweddell v. Tweddell*, 2 *Bro. C. C.* 101.; *Butler v. Butler*, 5 *Ves.* 534.), unless the intention of the purchaser appears to be to make the debt his

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own, (*Parsons v. Freeman*, *Amb. R.* 115.; *Woods v. Huntingford*, 5 *Ves.* 132.) The distinction seems to depend upon communication with the mortgagee, or some other act done by the party to make the debt his own. There is much information upon the subject in *Butler v. Butler* and *Woods v. Huntingford*. A mortgage upon a man's estate not of his contracting, is not considered his debt, payable primarily out of his personal estate. On the other hand, a man may make a mortgage debt of his own contracting to be considered payable primarily out of his real estate, as a devise to trustees to sell and pay a mortgage thereon; but it seems that a conveyance upon trust to sell and pay debts generally, does not exempt the personal estate, (*Tait v. Lord Northwich*, 4 *Ves.* 816.) With respect to a devise upon trust for sale to pay debts generally, Lord *Thurlow*, in the case of *Hale v. Cor* (3 *B. C. C.* 522.), appears to have drawn a distinction on this point as against different characters — legatee of personal estate, and next of kin, — expressing an opinion in favour of an exemption of legatees from the payment of a mortgage debt under the circumstances of that case; but, in the case of next of kin, charging the personal estate with the mortgage; and in subsequent cases (*Gray v. Minnethorpe*, 5 *Ves.* 103.; *Burton v. Knowlton*, 5 *Ves.* 106.; *Brummel v. Prothero*, 3 *Ves.* 110.), Sir *Richard Pepper Arden*, Master of the Rolls, recognized and acted upon the distinction, exempting the personal estate where specifically bequeathed, but subjecting it to mortgages where the personal estate went to the executor without any particular powers or appropriations; and in one of those cases the same learned Judge said, he was not one of those Judges who thought there was much difference between a charge for debts and a devise for payment of debts, unless there were demonstration that the personal estate was intended to be exempted.

In order to exempt the personal estate, the Judge must be satisfied, on looking at the whole will, that it was the testator's intention to exempt the personal estate; and circumstances, *dehors* the will ought not to be called in to assist the explanation (1 *Mer.* 216. 220.): the Judge will not look out of the will as to the state of the testator's affairs (5 *Ves.* 113.) In *Boote v. Blundell* (1 *Mer.* 193.), the testator gave 3000*l.* to each of his daughters, and directed that his funeral expenses and legacies should be paid out of his monies and the rents and fines then due to him. He gave the surplus to his son and daughters. The testator then devised all his manors to trustees for the term of 500 years, in trust, out of the rents and profits, to pay his debts, and the annuities and legacies thereafter mentioned. Lord *Eldon* held, that the personal estate was exempted from the payment of debts.

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July 11

HARPER and Another, Assignees of BUTLER,
Plaintiffs;

AND

SARAH ELIZABETH RAVENHILL and
GEORGE RAVENHILL, - - Defendants.

*Husband and
wife.*

*Wife's rever-
sion in per-
sonality.*

*Bankrupt.
Stamp.*

—
The wife of a bankrupt was entitled, under the will of her grandmother, to a moiety of certain public funds on the death of her mother. Her husband became bankrupt; then the wife died; then the mother died. On a bill filed by the assignees of the bankrupt against the executrix of the grandmother and the administrator of the wife of the bankrupt: Held, that the bankrupt, having survived his wife, the assignees became beneficially entitled.

SARAH ROEBUCK, by her will, gave to her executors 6*l.* per annum bank annuities, and 1481*l.* 18*s.* 1*d.* three per cent. consolidated bank annuities, upon trust for her daughter for her life as therein mentioned; and after her decease, to transfer the same unto and between her two grandchildren, the Defendant *Sarah Elizabeth Ravenhill*, and *Ann*, afterwards the wife of *James Arthur Butler*, to be vested at the age of twenty-one years or day of marriage.

The testatrix's daughter and two granddaughters were the surviving executrixes, and they proved the will.

The bill stated the marriage of the granddaughter *Ann* with *James Arthur Butler*, his subsequent bankruptcy in 1818, and that the Plaintiffs were the assignees under the commission. She died in 1820, in the lifetime of her mother, the daughter of the testatrix, leaving her husband her surviving, and letters of administration to her effects have been granted to the Defendant *George Ravenhill*. The bankrupt died intestate in *May* 1821, and letters of administration to his effects were granted to the Plaintiffs. The testatrix's daughter died in *June* 1823; and the Plaintiffs claimed to be en-

titled to a moiety of the stock. *Sarah Elizabeth Ravenhill* was the surviving executrix of the will of the testatrix her grandmother. The stock remained in the name of the testatrix.

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Mr. Ching for the Plaintiffs. All the interest of the bankrupt vested in the assignees, subject to the chance of the wife surviving him, but she died in her husband's lifetime, and upon her death the title of the assignees became perfect; the assignees have procured letters of administration to be granted to them; the administration has been taken without stamp, because the fund is in litigation, and the amount of the assignees' interest has not been ascertained.

Mr. Rose and *Mr. Beames* for the Defendant, *Sarah Elizabeth Ravenhill*. The trustee is only anxious to pay the money to a competent authority, and the administration having been taken under 20^l., it did appear to her legal advisers that the administration did not give a sufficient authority.

The MASTER of the ROLLS. I can only make a decree when the letters of administration shall have been corrected. Letters of administration are necessary to complete the title.

Letters of administration, under which a Plaintiff makes title, must be stamped *ad valorem*.

Mr. Ching said, he understood that the ecclesiastical court did not put a stamp when the property was in litigation, and he submitted that the court would then make the decree, putting the Defendant upon terms to obtain the administration.

The MASTER of the ROLLS. I think differently, for I must protect the revenue.

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Let the cause stand for a week, with liberty to the Plaintiffs to take out proper letters of administration: the assignees now must do so; for having taken upon themselves the character of administrators, they cannot now retire.

On a subsequent day the administration having been perfected, the cause was again brought on, when Mr. Barber appeared for *George Ravenhill*, and contended that it was property acquired by the husband after the bankruptcy, and therefore did not pass under the assignment.

The MASTER of the ROLLS decided the contrary, holding it to be clear, that the beneficial interest passed to the assignees.

By the decree it is declared that *George Ravenhill* was a trustee for the Plaintiffs for one moiety of the stock, and that *Sarah Elizabeth Ravenhill* should sell out the same; that the costs, charges, and expenses of all parties as between solicitor and client should be taxed. And *Sarah Elizabeth Ravenhill*, after deducting her own costs, and paying the costs of the Plaintiffs and of *George Ravenhill*, should pay the remainder to the Plaintiffs.

Reg. Lib. A. 1828. fo. 2124.

The order as to costs was an arrangement between the parties.

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MUNNINGS v. BURY.

ROLLS.

July 15.

*Power of attorney.**Confirmation.**Principal and surety.*

THE Plaintiff was engaged in shipping and mercantile speculations with *George Bridges*, *George Elmer*, and *Samuel Howlett*, who carried on their business at *Manningtree*, in the county of *Essex*, under the firm of *Bridges and Company*; and with Defendants, *William Rothery*, and *Thomas Burleigh*: the latter was the Plaintiff's son-in-law. The firm of *Bridges and Company* were concerned in the ship *Melantho*, and in the speculations in which she was employed, in the proportion of seven twenty-fourths; *William Rothery* in the like proportion of seven twenty-fourths; *Thomas Burleigh* in three twenty-fourths; and the Plaintiff himself in the remaining seven twenty-fourths. In *February* 1815, this vessel was freighted by the owners for the *Cape of Good Hope*, and Plaintiff went out as managing owner; Several other ships and vessels followed him. In 1816 the Plaintiff duly executed and sent to *England* a power of attorney to *William Rothery* and *Thomas Burleigh*, and *Sally Munnings* the Plaintiff's wife, to recover all sums of money, goods, wares, and merchandizes, effects, property, chattels, ships, and vessels, and to take all requisite proceedings at law and in equity for that purpose; to adjust, liquidate, and finally settle all accounts;

A merchant, being abroad, empowers certain persons in this country to receive monies, adjust claims, and do some other acts. Money being wanted by the firm here, of which he was a partner, these attornies deposit the deeds with the *Hope Insurance Company* to secure 12000*l.*, and covenant that he shall execute the mortgage; this 12000*l.* was also secured by the bonds of

sureties in sums corresponding to the shares of the partners.

The power of attorney was not a sufficient authority; but the merchant, on his return to this country, having written a letter to the *Hope Company*, requesting the loan of 6000*l.*, "to be secured on his *Essex* property, which you now hold, in addition to the 12000*l.* already advanced;" and professing his readiness to execute the mortgage-deed:

Held, that this was a confirmation of the security.

Some of the parties having paid the amount of the sums secured by them:

Held, that they had a lien on the property.

One of those sureties being a partner:

Held, that the sum paid by him was subjected to the partnership accounts.

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and upon payment or receipt, in his name to sign, seal, and deliver all such receipts, releases, acquittances, and discharges, deeds or instruments as should be necessary; to compound debts and to indorse bills of exchange; to sell the ship *Melantho* and other vessels; to let and hire vessels to freight; to make insurances on ships, and generally to act for him. *William Rothery* was deputy chairman and a trustee of the *Hope Insurance Company*. The *Hope Insurance Company* having been applied to for a loan of 12,000*l.*, agreed to advance that sum upon a deposit of the title-deeds of the Plaintiff; and thereupon certain articles of agreement were prepared, bearing date the 7th *November* 1817, and made between the Plaintiff by the said *T. Burleigh* and *Sally Munnings*, therein described as his attornies lawfully authorized for the purposes thereafter mentioned of the first part; the said *Thomas Burleigh* of the second part; the Directors of the *Hope Insurance Company* of the third part; and *William Rothery* and four others, therein described as trustees of the said company, of the fourth part, reciting the power of attorney: It is witnessed, that in consideration of the sum of 12,000*l.* therein mentioned to be then advanced to and for the use and benefit of the Plaintiff, by payment of the same into the hands of the said *T. Burleigh* and *Sally Munnings* as his attornies as aforesaid, Plaintiff, by the said *T. Burleigh* and *S. Munnings*, delivered unto and deposited with the company the deeds and writings as a pledge and security for the payment of the sum of 12,000*l.* with interest, on the 1st of *June* 1820. *T. Burleigh* thereby covenanted that Plaintiff should within eighteen months execute a mortgage to secure the 12,000*l.*, interest, and costs.

A receipt for the 12,000*l.* from *S. Munnings* and *T. Burleigh* was indorsed.

As a collateral security to the company for the payment of the 12,000*l.* and interest, it was agreed that the said *George Bridges* and *G. Elmer* should procure two of their friends as sureties to execute a bond to the said trustees for securing 2333*l.* 6*s.* 8*d.*, being two thirds of seven twenty-fourths thereof with interest; and that *S. Howlett* should produce his brother as a security, to join with him in a bond for securing 1166*l.* 13*s.* 4*d.*, being the other or remaining one third of seven twenty-fourths thereof, with interest; and that the said *William Rothery* should procure two of his friends as sureties on his behalf to execute a bond for securing 3500*l.* being other seven twenty-fourths thereof, with interest; and that two friends of Plaintiff and of the said *T. Burleigh* should execute a bond for securing 5000*l.*, being the remaining ten twenty-fourths thereof, with interest, on account of Plaintiff and the said *T. Burleigh*.

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Accordingly, four several bonds, bearing even date with the articles of agreement, and amounting to the sum of 12,000*l.*, were executed to the trustees named in the articles; viz. one of such bonds was the joint and several bond of the Defendants *John Elmer* and *John Lewis* in the penalty of 4666*l.*, with the condition thereunder written for making void the same if Plaintiff should within the space of eighteen calendar months execute the bond and mortgage in the articles mentioned, or failing that event, if *J. Elmer* and *John Lewis* should pay to the said company the sum of 2333*l.* 6*s.* 8*d.*, part of the said sum of 12,000*l.* with interest, and also with such costs as the company might incur in enforcing the performance of the said articles; and another of such bonds, was the joint and several bond of the Defendants *S. Howlett* and *R. Howlett*, in the penalty of 2333*l.* with the like condition as aforesaid, save that the sum thereby secured was 1163*l.* 13*s.* 4*d.*, with interest and costs as

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aforesaid; and another of such bonds was the joint and several bond of the Defendants *J. Adamson* and *R. Jackson* in the penalty of 7000*l.*, with a like condition as aforesaid, save that the sum thereby secured was 3500*l.*, and with interest and costs as aforesaid; and the other of such bonds was the joint and several bond of *F. Stott*, since deceased, to whose effects the Defendant *E. Stott*, widow, hath taken out letters of administration, and the Defendants *Thomas Stott* and *John Burleigh* in the penalty of 10,000*l.*, with a like condition as aforesaid, save that the sum thereby secured was 5000*l.*, with interest and costs aforesaid.

The 12,000*l.* was received by *Mr. Ireland*, a solicitor appointed by *Mrs. Munnings* and *T. Burleigh*, and applied by him, through *Rothery* and *T. Burleigh*, in payment of the debts of the partnership.

William Rothery executed and gave to *Sally Munnings* and *Thomas Burleigh* his bond, bearing date the 4th February 1818, whereby he bound himself in the penal sum of 2000*l.*, with a condition thereunder written, reciting the power of attorney and the articles of agreement, and that the sum of 12,000*l.* had been accordingly advanced by the said office, and that it had been agreed that the interest of the said sum of 12,000*l.*, when the same should from time to time become due, should be paid and discharged out of the remittances which should or might be made by the Plaintiff; but in the event of such remittances not arriving in due time, it had been agreed that the interest should be advanced and paid in the proportions following; (that is to say,) the interest for the sum of 5000*l.*, part of the said sum of 12,000*l.*, by the said *T. Burleigh* and *Sally Munnings*, on the part and behalf of the Plaintiff and of the said *Thomas Burleigh*; the interest of the sum of 3500*l.*, further part thereof, by

the said *William Rothery*; and the interest of the remaining 3500*l.*, by *George Bridges*, *George Elmer*, and *Samuel Howlett*, constituting the late firm of Messrs. *Bridges and Elmer*: but that when remittances should arrive sufficient to enable the aforesaid interest to be paid, that the several sums of money which should have been advanced and paid in the proportions aforesaid should be refunded and repaid to the said parties respectively, so far as the said remittances would extend for that purpose; and that, for the purpose of effectuating such arrangement so far as related to *William Rothery*, it had been agreed that he should enter into that bond with the following condition:—“That if the said *William Rothery*, his executors or administrators, did and should from time to time, so long as the said sum of 12,000*l.*, or any part thereof, should remain due and owing to the said *Hope Assurance Company*, upon the security aforesaid, apply such remittances as should or might thereafter come to his hands from the Plaintiff, or on his account, in paying and discharging the interest of the said sum of 12,000*l.*, or so much thereof as such remittances would extend to pay at the times when the same should become due and payable; and in the event of not receiving remittances in sufficient time for such purpose, or in case the same should be insufficient to pay the whole of the interest due, then if he the said *William Rothery*, his heirs, executors, or administrators, should, out of his own proper monies, well and truly advance and pay, or cause to be paid and advanced, unto the said *T. Burleigh* and *Sally Munnings*, their executors or administrators, within twenty-one days next after they or either of them should have paid such interest to the *Hope Assurance Company*, the interest of 3500*l.*, part of the said sum of 12,000*l.*, or such part of the sum actually paid by the said *T. Burleigh* and *Sally Munnings*, their executors or administrators, as

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should be in the same proportion to the sum actually paid as the said sum of 3500*l.* bears to the said sum of 12,000*l.*; and that in case remittances subsequently arrived and came to his hands, if he the said *William Rothery*, his executors or administrators, should forthwith thereout repay to the said *T. Burleigh* and *Sally Munnings*, their executors or administrators, *pari passu* with himself and the said Messrs. *Bridges* and *Elmer*, such sum or sums of money as he, she, or they should or might have theretofore advanced and paid on account of the said interest, or so far as such subsequent remittances should extend, *then* the said bond or obligation to be void, or else to remain in full force and virtue." There was also a similar bond from *George Bridges*, *George Elmer*, and *Samuel Howlett* to the said *Sally Munnings* and *Thomas Burleigh*, bearing date the same 4th day of *February* 1821, in a like penalty of 2000*l.*, and with a like condition; but there was no evidence to shew that this bond was executed by any person but *George Elmer*.

The Plaintiff by his bill charged, that the sum of 12,000*l.* ought to be considered as having been received solely upon the security of the obligors in the said four several bonds to the trustees, and that the company ought to be compelled to deliver up to the Plaintiff the several title-deeds, evidences, and writings, free from all claim and demand whatsoever of the said company; and the Plaintiff charged, that he had not confirmed the security, and that all his letters to the *Hope* Company were conditional propositions. And the bill prayed, that the Defendants might make a full, fair, and perfect discovery of all and singular the matters aforesaid. And that the Defendants, the trustees of the company, might be compelled to deliver up to Plaintiff all the title-deeds, evidences, and writings of or relating to his said estates, or any of them, freed and discharged of and from all claim

and demand whatsoever in respect of the premises. And that the articles of agreement bearing date the 7th day of *November* 1817 might be delivered up to be cancelled. And in case it should be held by the Court that the Plaintiff was bound to pay the 12,000*l.*; or any part thereof, that *William Rothery* and Plaintiff's other partners might be compelled to repay and make good to Plaintiff the said sum of 12,000*l.* and interest, or what he should be compelled to pay of the same, or at least what he should be compelled to pay over and above his share and proportion of the 12,000*l.* as such partner as aforesaid. And that the *Hope Insurance Company* might be directed to hold the shares of *William Rothery* and *Thomas Burleigh* of and in the capital stock thereof, and the dividends which had accrued or should accrue due thereon as trustee for the Plaintiff, for the purpose of reimbursing him the said sum of 12,000*l.* and interest, or what he should be compelled to pay of the same, or at least what he should be compelled to pay over and above his share and proportion of and in the same as such partner as aforesaid.

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A supplemental bill stated an action brought by the *Hope Insurance Company* against the Plaintiff, for recovering what remained due to them, in which a verdict was found for 8008*l.*, and that judgment had been entered up for the same and 280*l.* costs; and set forth a mortgage by Plaintiff to the *Hope Insurance Company* for 8478*l.*, the amount of the judgment obtained against him for damages and costs, and including 190*l.* for interest; and charged that the persons who entered into the four several bonds had no lien upon the deeds; and praying that he might be allowed to redeem on payment of the principal money and interest on such mortgage.

Samuel Howlett and *Robert Howlett* being called upon by the *Hope Insurance Company* for the sum of

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1166*l.* 13*s.* 4*d.* mentioned in the condition of the bond, and *Samuel Howlett* being unable to pay the same, *Robert Howlett* paid the principal, and *Samuel Howlett* a small sum for interest; and they claimed a lien on the securities in the hands of the *Hope Insurance Company*, as a security for the repayment thereof by the Plaintiff. *John Adamson* and *Richard Jackson* had made an investment to secure the sums in their bonds.

John Elmer invested 600*l.* of the monies secured by the bond of himself and *John Lewis*.

John Lewis was sued on the bond, and judgment obtained against him for the remainder.

The Plaintiff returned to *England* in the month of *October* 1821, and, on the 8th of *November* 1821, wrote the Directors the following letter:—“ Being desirous of raising a sum of money to discharge some engagements entered into by me and others, which remain to be paid, I propose to borrow a sum of 6000*l.* to be secured on my *Essex* property which you now hold, in addition to the sum of 12,000*l.* already advanced by your honourable company, and secured thereon; which security I trust you will consider to be satisfactory, you having already received in aid of the said security between 5000*l.* and 6000*l.*: having been abroad during the last six years in the *East Indies*, the mortgage deed for securing the above sum of 12,000*l.*, which I understand was sent to me to be signed, never reached me. That deed I am ready to execute, and to do any act that may be considered necessary and satisfactory to you for securing the repayment of such further sum as may be agreed to be advanced. I am, Gentlemen, your obliged humble servant, *G. G. H. Munnings.*”

BEFORE THE MASTER OF THE ROLLS.

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On the 20th *November* 1821, the following letter was written by the Plaintiff to the *Hope* Company :—

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“ Gentlemen,— When I had the honour to attend your board on *Wednesday* last, a question was proposed to me by one of the gentlemen of the board, if I should be willing to pay the balance of principal and interest due to the *Hope* Company, they retaining the money already received by them under the collateral bonds, on the delivery to me of the title-deeds of my estates in *Essex*, now in your possession for securing 12,000*l.* and interest ; to which I replied, that if I could accomplish it I would readily pay the balance, and that I would lose no time in considering it. I have since weighed the matter fully in my mind, and I will engage to pay such balance on the company delivering to me my title-deeds now in their possession, and executing a sufficient release. Should this be declined on the part of the *Hope*, I will then propose to perfect the mortgage-deed already prepared for securing to the *Hope* Company 12,000*l.* and interest, in any way that may be deemed necessary in order to make them perfectly secure, they withholding proceedings against the persons who have executed collateral bonds on my part for securing 5000*l.*, part of the said 12,000*l.*, for such time as may be agreed upon ; and also to permit Messrs. *Adamson* and *Jackson* to withdraw the 3500*l.* paid by them conditionally in aid of the said mortgage. The above proposals are made in order to save unnecessary expense, and to enable me to exert myself to discharge the mortgage altogether, which it is my most anxious wish to do.

“ I am, Gentlemen,

“ Your much obliged, humble servant,

“ G. G. H. MUNNINGS.”

The directors having refused to make a further advance, on the 27th *November* 1821 the Plaintiff wrote

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to the directors, that being disappointed in his application to the *Hope* for the sum of 6000*l.*, or to deliver to him the title-deeds on his paying 5000*l.*, which he stated was his share of the 12,000*l.*, he must decline executing the mortgage.

The *Hope* Company by their answer contended, that they had a lien on the deeds for 12,000*l.* and interest.

The Defendant *Rothery* said, that although the partners were to procure collateral securities according to their shares, yet it was to be merely collateral to the deposit of the deeds, and that the estates were to be charged with the 12,000*l.* He stated that the *Hope* Company had retained his dividends on the shares he had therein as a security for the 12,000*l.*, in case it should be held that the Plaintiff was not bound to pay it.

The other partners admitted in their answers that they were to procure collateral securities, but they all, except *G. Bridges*, denied it was on their own behalf. *G. Bridges* admitted that he and *George Elmer* were to find sureties on their own behalf.

Rothery contended, that the Plaintiff was still indebted to him in a considerable sum of money.

Mr. *Rose*. The Plaintiff is a gentleman of considerable landed property, and a merchant, and the Defendants are the *Hope* Insurance Company and others. The object is to obtain as against the insurance company the deeds, not disputing to pay them their principal and interest, but denying the right of the sureties to any claim upon the deeds. The Plaintiff was entitled to seven twenty-fourths of this joint adventure. Up to 1814 this speculation was fortunate.

In 1814 the Plaintiff went to the *Cape* on an adventure to the joint account. The bonds were entered into by or on behalf of the partners for their own respective proportions: *Rothery* had no right to raise money upon the Plaintiff's deeds. The 12,000*l.* was not to be thrown upon the Plaintiff, but only a fractional part of it equal to his interest. The ship *Melantho* was sent home to this country to be sold. (Mr. *Rose* then read several letters from *Rothery* to the Plaintiff, dated *Doctors' Commons*, one on the 16th *November* 1815, suggesting a new mode of remitting; another letter in *January* 1816, that a dissolution of partnership had taken place between *Bridges* and *Elmer*, and expressing his astonishment at it. Another letter in *February* 1816, that *Bridges* and *Elmer* could not provide their proportion of the acceptances coming due, and expressing that it was fortunate that he did not meet with a ready sale at the *Cape*, as he would then have remitted the produce to *Bridges* and *Elmer*, expressing his opinion that they were not rich. Another letter, 20th *March* 1816, repeating the good fortune of no ready sale; and another letter, 7th *December* 1816.) These letters present perfect satisfaction with the Plaintiff, and that his property was not to be resorted to.

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The power of attorney was dated in *May* 1816, and does not notice the relation of the Plaintiff with the partners, and the Plaintiff thereby appoints his wife, *Burleigh* and *Rothery* his attornies, to defend actions, to sell the ship *Melantho*, to effect insurances, &c. It is given by the Plaintiff in his individual character; it does not give authority even to borrow money, but only to do the special acts mentioned. The *Hope* Insurance Company must put their case upon this power of attorney, and that power cannot support it. It is true, there are general words to act generally. In the case of *Atwood*

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and *Munnings* (a) in the King's Bench, the general power was held only to enable the attornies to carry the special powers into execution; and that a bill drawn by the attornies for partnership purposes was not within the power. If *Rothery* had not combined the character of chairman of the *Hope* Insurance Company and plaintiff's agent, no money would have been advanced by that company: if, therefore, he, under the power of attorney borrowed money for partnership purposes, he could not legally do it. Did *Rothery* make use of the Plaintiff's deeds for the purposes of the Plaintiff, or for his own purposes? The transaction could not bind the Plaintiff, nor affect his title-deeds. The inference to be drawn from the deeds executed by Mrs. *Munnings* and *T. Burleigh* is, that the company's legal advisers well knew it; or why, if the attornies had sufficient authority, was a covenant introduced, that the Plaintiff should execute a mortgage in eighteen months? *Rothery* is a general trustee for the company, and as such the covenant was made with him; and as such, and not as one of the attornies, he was a party. There can be no case as against the Plaintiff in such a transaction. It is a distinct case from *Rothery* borrowing money as a partner. No letter reached the Plaintiff after the letter of December 1816. He did not arrive in this country until December 1821, when he was ignorant of what had been done, but he soon found an immediate necessity for raising 6000*l.*, and he wrote the letter to the insurance office bearing date the 8th November 1821 (*ante*, p. 154.), and another letter on the 20th November 1821 (*ante*, p. 155.); also another letter of 27th November 1821, declining to execute the mortgage. Now, upon the whole of these letters from the Plaintiff to the *Hope* Insurance Company, it is plain that he was acting under the impression that his property had been properly dealt with. His

(a) 7 B. & C. 278.

attention had not been deliberately directed to the facts, and, therefore, the letters could not be held to be a confirmation. It was to be considered only as a proposal to execute the mortgage, if 6000*l.* more were advanced. It was not accepted by the company, and effected nothing.

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The *Hope* Company brought an action of *assumpsit* against him ; by some slip he had not been able to plead in abatement, and he was put under terms not to take advantage of his partners not being parties, and a verdict passed against him. He then executed a mortgage to the *Hope* Insurance Company, mentioned in the supplemental bill.

Mr. *Lynch*: The condition of each bond was, that if the Plaintiff failed to execute the mortgage the obligors were to pay these sums. The power of attorney is not recited in the bonds ; but the bonds notice the articles of agreement. The sureties, by their answer, state that the bonds were entered into at the solicitation of the respective partners for whom they were sureties.

These sureties were for 7000*l.*, and the 5000*l.* makes the 12000*l.*

I mean to say, first, that they were not sureties for the Plaintiff ; secondly, that there was no valid deposit ; and, thirdly, that there was no confirmation.

A person entering into a bond does not become a surety without the request of the principal. These sureties could not have been for the Plaintiff, he being abroad.

The assurance on Mrs. *Munnings*'s parting with the deeds, was, that each of the partners should get his own securities in respect of his share. There is no evidence

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that they were the Plaintiff's sureties. The case of *Atwood and Munnings* in the King's Bench has decided that a general power did not give the authority. Again, the deposit cannot be extended beyond the *Hope Company*; that has been decided in *Ex parte Whitbread (a)*: it surely will not be contended that the loose language of the letters gives such an authority. Next, as to confirmation, if the parties had no power to deposit the deeds the transaction is good for nothing. *Rothery* obtained this money, not for the use of the Plaintiff, but for partnership purposes; a partner has not a right so to deal with his co-partner's property. The letters of the Plaintiff are mere conditional proposals, which not having been accepted, cannot be read against him according to the decision of Judges both at law and in equity. These letters do not refer to the sureties; and, at all events, they cannot be carried further than as securing the company. And there is no evidence to shew that the Plaintiff was aware of the circumstances when he wrote the letters.

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On the 7th of *November* 1817, Mrs. *Munnings* and Mr. *Burleigh*, her son-in-law, on the company advancing 12,000*l.*, covenant that the company shall retain the deeds as security, and *Burleigh* covenants that the Plaintiff shall execute a bond or mortgage for securing that sum. It is impossible to contend that they had authority to enter into that engagement; but did Mr. *Munnings* confirm it? Mr. *Munnings* at that period was abroad, and he continued abroad until *October* 1821, when he returned. On the 8th of *November* he writes a letter to the *Hope Insurance Company*. I

(a) 1 *Rosc.* 299.

cannot conceive any language more clear and express than his admission of the engagement entered into by his wife and son-in-law. His letter is in these words: — “ Being desirous to raise a sum of money to discharge some engagements entered into by myself and others, which remain to be paid, I propose to borrow a sum of 6000*l.*, to be secured on my *Essex* property, which you now *hold*.” He then proceeds, “ in addition to the sum of 12,000*l.* already advanced by your honourable company and secured thereon, which security I trust you will consider to be satisfactory.” Now, it is asserted at the bar that this is not admission, but merely proposal, “ which you will consider to be satisfactory.” Does not this shew that he had no idea of disturbing the security. He then adds, “ you having already received in aid of the said security between 5000*l.* and 6000*l.* Having been abroad during the last six years in the *East Indies*, the mortgage deed for securing the above sum of 12,000*l.*, which I understand was sent to me, never reached me. That deed I am ready to execute, and do any act that may be considered necessary and satisfactory to you for securing the repayment of such further sum as may be agreed to be advanced.” This, too, it is contended, is a conditional proposal. A greater perversion of the effect of language could scarcely have been made. Now, without referring at all to the other letters, this is a clear acknowledgment of the title of the *Hope* Insurance Company.

But it is said that he was in ignorance of the facts: is it possible to believe this gentleman had not been informed by his wife and son-in-law of all they had done on his part? It must be intended upon every principle of evidence that when he wrote this letter he was in full possession of all the facts.

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The next question is, Whether the sureties, and who in particular of them, have a right to stand in the place of the mortgagees. One of these sureties was a partner, and he must submit to a partnership account.

The other persons who entered into these securities were not partners, and it is said they have no claim on the estate, as their security was given on account of others of the partners, at whose request they entered into the engagements. If it had been stipulated when they became sureties that they should not claim against the Plaintiff's estate, it would have been a different matter. On what principle, then, is it that they are not entitled to the full benefit of the security arising from Mr. *Munnings's* estate? The question is, Have the sureties a lien on the estate? If a surety pay part of a sum for which an engagement has been entered into by the principal, he may claim against the estate that formed the principal security.

It is impossible without stipulation to exclude the sureties from being entitled to the security of the estate pledged. I am of opinion that they have a lien upon the estate pledged for the sums paid by them.

Refer the partnership accounts to the same Master before whom the partnership accounts were taken in another cause.

I must declare that the several sureties not being partners have a lien upon this estate for the amounts they have paid, with interest and costs.

The decree has not yet been passed and entered, but the following is the substance of the minutes as they at present (*March 1830*) stand:—

Decree, that, subject to the mortgage to the *Hope Insurance Company*, the Defendants, *J. Adamson, Richard Jackson, John Lewis, John Elmer, Robert Howlett*, and *John Burleigh*, and *Elizabeth Stott*, as the representative of *Thomas Stott* deceased, sureties for the Plaintiff to the *Hope Assurance*, and not being partners with the Plaintiff, are entitled to a lien on the estate for the principal money paid by them in respect of the sum of 12,000*l.*, together with interest at five per cent., and their costs and charges. Refer it to the Master to take an account of what is due to the *Hope Insurance Company* for principal and interest on the mortgage in the pleadings named, and to tax their costs.

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Also to take an account of what is due to the sureties for principal and interest, charges, and expenses, and to tax their costs.

Decree, that upon Plaintiff paying what is due to the insurance company and sureties within six months after the Master shall have made his report, then that the trustees of the *Hope Insurance Company* reconvey the mortgaged premises to the Plaintiff, and that the sureties join therein. In default of the Plaintiff redeeming the insurance company, the sureties are to be at liberty to redeem the company, and then it is referred to the Master to tax subsequent interest and costs, and appoint a new time and place for payment; and upon the sureties paying to the trustees of the insurance company their principal, interest, and costs, within three months after the Master shall have made his report, at such time and place as the Master shall appoint, the trustees are to reconvey to the sureties; and in default of payment both by the Plaintiff and the sureties, the bill to be dismissed as against the trustees of the company and the sureties with costs. The Master to take an account of all partnership dealings and transactions between the Plaintiffs, and the Defendants *William Rothery, George Bridges, George Elmer, Samuel Howlett*, and *Thomas Burleigh*. The Master to be at liberty to state special circumstances.

Further directions and costs reserved.

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WESTMINSTER
HALL.

July 3.

*Partition.**Assignment
of term of
years to
attend.**No revocation
of will.**Costs.—Heir
at Law.*

A testator devised his moiety of an estate, and then made partition with his co-tenant; on this, the estate was conveyed to a trustee as to one part to the use of the testator in fee; and a mortgage term created by the co-tenant in his moiety was assigned to attend the inheritance; Held, that this is not a revocation of the will.

Costs refused to the heir at law, he having conveyed his interest to two of his sisters.

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JOHN BARTON, by his will, bearing date the 8th of September 1775, gave unto *Edward Croxall, Esquire*, the sum of 500*l.*, to be raised and paid out of monies to arise from the sale after mentioned of his copyhold and real estates, upon the trusts therein mentioned; and he gave and devised unto his wife and *Edward Croxall*, their heirs and assigns, with other hereditaments, his undivided moiety or half part of and in a messuage, and certain lands, upon trust, that his wife and *Edward Croxall*, or the survivor of them, or the heirs of such survivor, should, when and as soon as they should think fit, sell and dispose of the same: and the money arising by and from such sale, after payment of the 500*l.*, he willed and desired to be placed at interest, until the same should be paid to his children, at the time and in manner thereafter mentioned; which interest, and the rents and profits in the meantime, were to be applied to the maintenance of the children, with the usual directions for the trustees to convey to the purchaser.

There were at this time seven children, but by a codicil the testator directed that *John Barton*, his eldest son, should have no share of the monies to arise by the sale; and that the part intended for him should be divided amongst his other children, except his daughter *Jane*; and the testator also directed that a sum of 100*l.* which he had given to her, should be considered as part of her share under the will.

The testator, after making his will, agreed with *Carter Barton*, the person entitled to the other undivided moiety or half part of the messuage and lands for the division thereof; and accordingly the testator and *Carter Barton* entered into mutual bonds, bearing date respectively the 16th April 1788, whereby they severally became bound to abide by the award of *Edward Palmer* and *Thomas Hanson*, who were to make a fair partition of the premises; and to settle all other matters between the parties, relating to the same premises. The arbitrators accordingly proceeded in making a partition of the estate between the testator and *Carter Barton*; and by indentures of lease and release, bearing date respectively the 15th and 16th days of June 1791; the release between *Carter Barton*, of the first part; the testator, *John Barton*, of the second part; *Joseph Scott*, a mortgagee for years of *Carter Barton*'s undivided share, of the third part; *John Dale*, of the fourth part; and *Charles Palmer*, of the fifth part. After reciting amongst other things the award of the arbitrators, *Carter Barton* and the testator conveyed unto *John Dale* the messuage, buildings, and premises, to the several uses following (that is to say); as to the south side of the said messuage, buildings, lands, and premises therein particularly described, to the use of *Carter Barton*, his heirs and assigns for ever; and as to the north side thereof, therein also particularly described, to the use of the testator, his heirs and assigns for ever, free from all incumbrances except a mortgage term of 1000 years created of *Carter Barton*'s moiety of the said premises, and then vested in the said *Joseph Scott*; and the said *Joseph Scott*, in consideration of the principal and interest to him paid by *Carter Barton*, assigned the undivided moiety of the premises so in mortgage to him, to *Charles Palmer*, his executors, administrators, and assigns, for the residue of the said term of 1000 years

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therein then to come and unexpired, in trust as concerning the north side or part of the entirety of the premises for the testator *John Barton*, his heirs and assigns, and to attend and wait upon the freehold and inheritance of the said north side or moiety of the premises; and as to and concerning the south side thereof, in trust for *Carter Barton*, his heirs and assigns, and to attend and wait on the freehold or inheritance of the south side or moiety of the premises.

The testator died on the 31st *March* 1792, some time after the execution of the said deeds of partition, and without having altered, expressly revoked, or republished his will, and leaving *Jane Barton* his widow, *John Barton* his eldest son and heir at law, and six other children; these six younger children then became entitled to the monies which should be produced by the sale.

The bill, after setting forth the preceding facts, then states, that notwithstanding the great length of time which had elapsed since the death of the testator *Edward Croxall*, the surviving trustee under the will of *John Barton*, had not proceeded to a sale of the premises devised to him for that purpose by the will of the testator. And the bill charged, that he refused to do so without the direction of the Court. And the bill prayed, that *Edward Croxall* might be decreed to proceed to a sale, that all necessary parties might join therein, and that the monies to arise therefrom might be divided amongst the plaintiffs and other persons entitled thereto.

Edward Croxall having died, the bill was revived against his son of the same name, who in his answer admitted that his father never did proceed to a sale,

because, that for many years after the death of the testator, the parties interested in such sale did not require such sale to be made, or did not agree about the sale thereof; and that some of the parties were unwilling it should take place, and submitted to act as the Court should direct. This Defendant then also died, and the bill was revived against his devisees, *Wm. Tongue* and *Thomas Holbecke*.

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The heir at law, by his answer, submitted it was a question of law, whether the said alleged deeds of partition of the 15th and 16th of *June 1791* did or not, in any and what manner, operate as a revocation of the testator, *John Barton's*, will, in the whole or in any, and what part thereof, and how. Also whether he was or was not entitled to the moiety of the lands, hereditaments, and premises as the heir at law of the testator *John Barton*, or to such portion or part of the entirety as the testator acquired under the alleged deeds of the 15th and 16th *June 1791*, if such were made, or any other deeds, and if such deeds of the 15th and 16th *June 1791*, or any other deeds operated as a revocation of the testator's will and codicil, which the Defendant submitted to the judgment of the Court.

Mr. Pepys and *Mr. Whitmarsh* for the Plaintiffs.

Mr. Rouspell, jun., for one of the children.

Mr. Beames for the heir at law. The partition was a revocation of the will, because the testator, or more properly his trustee, took under the conveyance an estate different from that he previously possessed. The two owners conveyed to a trustee, and a term was assigned to attend the inheritance. It is not meant to contend that a simple partition revokes a de-

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vise (a), but to avoid a revocation he must take back the same estate. In the case of *Tickner v. Tickner* cited in *Parsons v. Freeman* (b), the father died seised in fee of an estate in gavelkind intestate, and left two sons, who entered on his death and became seised in gavelkind. One of them made his will, and thereby devised his undivided moiety to his wife and her heirs. Subsequently by a deed of partition between the brothers, and by a fine, all this gavelkind estate was allotted entirely to him who had so made his will to such uses as he should appoint by deed or writing. And in default of such appointment to him in fee, this was held by Lord Chief Justice *Lee* to be a revocation of the will.

There was also the case of *Goodtitle and Otway* (c), in which the question was, whether a devise was rendered ineffectual by a subsequent lease and release to trustees upon certain trusts, with remainder to the testator in fee. Mr. Justice *Rooke* said, if a testator having executed his will, conveys away his whole fee simple, though it be to his own use, yet, according to the rules of law, that conveyance renders the will ineffectual, for he has altered his legal seisin. He added, partition is an exception, for parceners, and tenants in common being seised only of their respective portions in an undivided whole, would, by writ of partition, retain their seisin in the portions allotted them, and they may divide by deed and fine (d); but he adds, the courts of law are rigid in this, and cites the example in *Tickner v. Tickner* as a revocation.

(a) *Luther v. Kidby*, 8 Vin. tit. Devise. 3 P. W. 170. 2 Ves. jun. 600. *Swift v. Roberts*, Burr. 1490.

(b) 3 Atk. 742. *Ambler*, 116.

(c) 1 B. & P. 576. 2 H. Bl. 516. 7 T. R. 399. *Sparrow v. Hardcastle*, 3 Atk. 805. 4 Burrow, 1960. 1 Roll. Abr. 615.

(d) *Risley v. Ballinglass*, Sir T. Raym. Rep. 240.

Mr. Justice *Buller* considered the point of revocation so fully established by ancient and modern authorities, that to doubt about it would be to shake the rules of property: referring to *Tickner v. Tickner* (a), he said the fee and the old use vested in the testator, and yet because the partition was made by means of a conveyance to a trustee, it was holden to be a revocation. He found it difficult to reconcile the case of *Tickner v. Tickner* with *Luther* and *Kidby*, if in partition the estate be conveyed to a trustee, though for an instant only, and though the old use remain, he thought that cases established it to be a revocation.

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In a subsequent case (b), Lord *Eldon* said, "That the devisor must continue to have the land to his death, when the devise is to take effect; if a partition is effected either by compulsion or agreement, and the thing done is nothing more than partition, it is not a revocation; the slightest addition to that purpose will make it, not as a partition, but on account of that slight addition, a revocation, and if the parties will even introduce a power of appointment prior to the limitation of the uses, that very slight circumstance is sufficient." In another case (c), Lord *Eldon* said, the case of partition is always considered a sort of special case, each party can compel the other to make partition. There is one other case before Lord *Eldon*, that of *Maundrell v. Maundrell* (d), where his lordship said that the distinction between *Tickner v. Tickner* and *Luther v. Kidby* was

(a) *Ambl.* 117.

(b) *Bridges v. Duke of Chandos*, 2 *Ves.* 429. *Knollys v. Alcock*, 7 *Ves.* 564.

(c) *Attorney-General v. Vigor and others*, 8 *Ves.* 281. *Ward v. Moore*, 4 *Madd.* 368. *Rawlins v. Burgis*, 2 *V. & B.* 382.

(d) 10 *Ves.* 249.

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obvious: in the one, the object was a mere partition; the devisor, having an undivided moiety of an estate, took a divided moiety, and it was held no revocation, there being no purpose beyond partition; but where a partition is made, and in the mode of doing it the devisor conveys to such uses as he shall appoint, and in default of appointment to himself in fee, that is a revocation. Why? Because he had limited the power. This principle was acted upon in *Rawlins v. Burgess*. (a) A person who had contracted for the purchase of an estate made his will, and afterwards took a conveyance to the common uses to prevent dower: the Vice-Chancellor considered the question to be, whether the estate remained the same without modification. The contract pointed only at an estate in fee. The conclusion must be, that there was some object beyond the mere completion of the contract, by taking the legal estate; and consistently with all the authorities, the effect is a revocation. The same point was decided in *Ward v. Moore*. (b) The subsequent conveyance made an alteration in the quality of the estate, and was, therefore, a revocation. From all these authorities it follows that the partition and the mode of effecting it, were in the particular case now before the Court a revocation of the will.

Mr. *Bickersteth* and Mr. *Lynch*, for several of the children, opposed the sale, contending they had a right to elect to take the fee.

The MASTER of the ROLLS.

The testator has directed a sale. It is true they might have elected to take real estate, but what pretence is

(a) 2 *Ves. & Bea.* 382.

(b) 4 *Mad.* 372.

there to say they have elected? There is nothing to shew that the parties intended to give up the advantage of the sale; therefore the only point I wish to call attention to, is that of the partition.

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Mr. *Pepys* contended, that that which is necessary to the partition is not a revocation, but what is inconsistent with it, is; and that in this case the assignment of the term was not inconsistent with partition, and that nothing had been done that would have the effect of revoking the will.

Mr. *Bickersteth* then commented upon the case of *Tickner v. Tickner*, cited by Mr. *Beames*, and contended that not any case had been cited where the party took the same interest, in which it had been held that a partition was a revocation.

Cur. adv. vult.

The MASTER of the ROLLS.

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Feb. 8.

It is admitted that a mere partition, without more, does not revoke a will. Here the nature of the interest was not changed, nor was there a new power of disposition acquired, and a mere assignment of a mortgage term to attend the inheritance does not revoke the will.

Decree a sale, and that all proper parties join therein, and in the conveyance, including the heir at law, and that the purchase money be distributed according to the rights of the parties as prayed.

Costs were refused to the heir at law, and to those who claimed under him. It appeared that the heir at law had conveyed to two of his sisters.

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The representative of *Edward Croxall* the trustee to have his costs as between attorney and client; and all other parties who do not claim adverse to the will, to have their costs.

ROLLS.

1829.

July 22.

Notice to
agent.

Liability of
executors.

Trustees not affected by notice to their agent, which he did not receive in that character.

Trustees, having contracted to purchase land, sell out stock, and deposit the produce at a banker's, when the purchase seems to be near completion. They are not liable to make good the money if the bankers fail.

FRANCE v. WOODS.

THE bill, in this cause, was filed for the purpose of administering the assets of *John France*, by the person entitled for life to the income of the real and personal estate. The Defendants were his executors, *Thomas Woods* and *Wm. Berry*, and several persons interested under his will. The bill also sought to make the executors personally liable for certain sums, parts of the assets, which had been lost by the failure of Messrs. *Warwick* and Company, bankers.

By the decree made by the Vice-Chancellor on the 26th *February* 1827, it was referred to the Master to take the usual accounts of the testator's personal estate, debts, funeral expenses, and legacies; "and in taking the account of the testator's personal estate, it was ordered that the Master should ascertain and state to the Court what balances or sums of money, part of the testator's personal estate, or the interest or dividends arising therefrom, were in the bank of Messrs. *Warwick* and Co. at the time of their becoming bankrupts, and under what circumstances such balances or sums of money were paid by the Defendants into the said bank, and whether the same ought to have been paid into or allowed by the said Defendants to have remained in such bank,

particularly in reference to the respective times when the said monies were so paid into the said bank."

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By the Master's report, dated the 12th *October* 1828, he stated the testator's will, by which he directed payment of several sums of money; and that his executors should not be answerable for the loss of the trust monies, "in depositing the same in any banker's hands or elsewhere for safe custody." And that the testator, for a very long time before his death, kept his banking account with Messrs. *Warwick* and Co., and had always a considerable balance of cash in their hands, amounting at the time of his death to 5696*l.* 10*s.* 2*d.*, and that they allowed him 4 per cent. interest on his balance; and that *Thomas Crook*, who was a principal clerk in the banking-house of Messrs. *Warwick* and Co. for some years previous to, and at the death of the testator, was as such principal clerk, frequently consulted and employed by him as his confidential agent in the management of his pecuniary concerns; and that after the death of the testator, the Defendants, *Thos. Woods* and *Wm. Berry*, with the concurrence and approbation of the Plaintiff, applied to and requested the said *Thos. Crook* to assist them in and about the testator's property, and the management of the executorship and of the trusts; and that the Defendants resided a considerable distance from each other, and from the neighbourhood of the testator's real estate, and were wholly incompetent and unable to manage the affairs of the trust without assistance; and that they accordingly, with the approbation of the Plaintiff, employed *Thos. Crook* to assist them in various matters respecting the executorship and trust; and that the Defendants, in the presence of the Plaintiff, agreed to employ Messrs. *Warwick* and Co. as their bankers in respect of the trust monies belonging to the

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testator's estate; and that Messrs. *Warwick* and Co. were induced, in consideration of the large balance which the testator had left in their hands, to allow upon all the trust monies deposited with them the same rate of interest which they had allowed to the testator during his life, although interest at 3 per cent. was usually allowed by them upon temporary deposits; and that the Defendants employed Messrs. *Warwick* and Co. as their bankers in respect of the trust monies, until they stopped payment and became bankrupts; and that there were then in their bank the balances mentioned in the report, part of the testator's personal estate, or interest or dividends arisen therefrom.

And he found that the Defendants, in execution of their trust, had entered into a contract for the purchase of real estate; and when they had every reason to believe that the purchase would be completed without delay, in order to provide for the payment of the balance of the purchase-money, and also to raise certain other sums of money which were then wanted for the trust estate, and for which the Defendants had not sufficient funds in their bankers' hands, they, in the month of *August* 1821, sold out 3000*l.* Navy 5 per cents., and caused the produce to be placed in the bank of *Warwick* and Co., and the defendants on that occasion stated to *Thos. Crook*, that they firmly believed that the money would be called for in a very short period of time. And he stated the circumstances which had delayed the conclusion of the purchase; and that, consequently, the Defendants were prevented making the payment of the balance of the purchase-money, amounting to 3200*l.*, out of the funds which were in the hands of the bank of Messrs. *Warwick* and Co. previous to their bankruptcy. And the Master allowed the executors these balances.

The Plaintiff excepted to the Master's report. The first exception being, that the Master ought to have stated that he found by the depositions that *Thomas Crook* was, from the 1st *January* 1810 to the time of the said Messrs. *Warwick* and Co. becoming bankrupts, their first and confidential clerk, and acquainted with the state of their affairs, and knew that the said Messrs. *Warwick* and Co., long before the time of their becoming bankrupts, were unable to pay the debts due from them, and must have stopped payment if called upon to pay the whole or a considerable part of the debts due from them, being the substance of the evidence of the said *Thomas Crook*; or, that the said Master ought to have set forth the evidence of the said *Thomas Crook* at length.

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The second exception was, that there did not exist any reason to believe that the purchase would be completed without delay.

And the third exception was, that this sum of 3200*l.* ought not to have been paid into such bank, or, if so, ought not to have been allowed by the Defendants to remain in such bank.

Mr. *Pepys* and Mr. *Lynch*, for the exceptions, contended that *Crook*, the agent of the executors, knew the insolvent state of the bank. A notice to the agent is notice to the principal. The monies ought not to have been continued in the bank.

Mr. *Bickersteth* and Mr. *Matthews* on the other side.

The MASTER of the ROLLS.

July 23.

Nothing would be more injurious to the interests of society, than the allowance of these excep-

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tions. Mr. *Crook* was employed by the testator, and the trustees only continued him. Can these trustees be liable to the losses occasioned by the failure of these bankrupts? Notice to the agent is notice to the principal, but then it must be in the character of agent. It cannot be held that they were liable. Secondly, it is said that the stock was sold out before it was wanted. Now it appears by the contract, that the purchase-money was to be paid on the 22d *March*. [His Honor here referred to some letters to the vendor's solicitors.] The trustees having received satisfactory answers to most of the enquiries, and in order that no time might be lost in completing the conveyance, sold out stock in *August*; from circumstances, the conveyance was not completed until *February*, and before that time arrived the bankers had failed. I am of opinion that it would be extremely injurious to the interests of society, that it would prevent persons from becoming trustees, were I to allow these exceptions. I shall therefore overrule them.

There were three other exceptions by the executors, in respect of sums which the Master had disallowed. The two latter were allowed, on the principle on which the Plaintiff's exceptions were overruled; but the first of the executors' exceptions was disallowed, as not coming within it.

Reg. Lib. A. 1828. fol. 2652.

1829.

BETWEEN

JOHN COOPER and JOSEPH SPRATT,
Plaintiffs;

AND

FERMIN DE TASTET and LOUIS CABANON, WESTMINSTER
Defendants. HALL.
Nov. 15.

THE Plaintiffs were warehouse-keepers in *Mark Lane*. In *April* 1819 Messrs. *Bize, Bordenave*, and Co. instructed them to land from the ship *Sirene* sixty-one bags of *French* wool, and warehouse them, which was accordingly done, and the wool was entered in the Plaintiffs' books in the names of *Bize, Bordenave*, and Co. On the 14th of *April* the Plaintiffs delivered to the order of Messrs. *Bize, Bordenave*, and Co. six of the bags. On the 3d of *July* Messrs. *Bize, Bordenave*, and Co. sent to the Plaintiffs an order to transfer the remainder of the wool, [reserving to themselves the privilege of drawing samples,] to the Defendant *De Tastet*, and it was accordingly transferred into his name.

On the 6th of *July* Messrs. *Bize, Bordenave*, and Co. sent to the Plaintiffs an order for the delivery of certain samples of the wool, which was complied with.

The Plaintiffs, on the 28th of *August*, received from *Augustus Roehn* a letter demanding the fifty-five bags of wool, offering to pay the warehouse charges, and to indemnify the Plaintiffs for the delivery thereof, and stating that the Defendant *De Tastet* had no claim whatever

Interpleader.
Private warehouse.
Bonded warehouse.

Warehousemen being private agents, and not holding goods as the possessors of a public bonded warehouse, cannot maintain a bill of interpleader.

But where goods are deposited in a public bonded warehouse, a bill of interpleader may be maintained against contending claimants.

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thereon. This was accompanied by another letter from Messrs. *Bize, Bordenave*, and Co. confirming the statement in *Roehn's* letter, and requesting the Plaintiffs to deliver the wools to *Roehn* or to warehouse them in his name, and that they would indemnify the Plaintiffs for so doing. The letter was written by *Roehn* as the agent of the Defendant *Louis Cabanon*. On the other hand, the Defendant *De Tastet* claimed the wool as his property. On the 20th of October the Defendant *Cabanon* sent the Plaintiffs a letter demanding the wool as his property, threatening an action if the same were not delivered to him, and giving notice that he had sold the wool, and offering to shew the most clear evidence of his right.

The bill stated the preceding facts, and prayed that the Defendants might interplead.

After the bill was filed the Plaintiffs, with the consent of *De Tastet*, delivered to the Defendant *Cabanon* twenty-eight of the bags of wool.

The Defendant *De Tastet* stated in his answer that he and *Bordenave* carried on the business of insurance and commission brokers, and in some few instances they carried on business as merchants under the firm of *Bize, Bordenave*, and Co.: that in the month of April 1819 *Cabanon* or *Roehn* consigned sixty-one bags of wool to *Bize, Bordenave*, and Co., in which firm he the Defendant was a partner. The Defendant also stated in his answer that the firm of *Bize, Bordenave*, and Co. made advances for *Cabanon* to the amount of 674*l.* 13*s.* 3*d.* on the credit of the proceeds to arise from the sale of the wool, and that the transfer was made to him in part satisfaction of a large sum of money lent by him to the firm.

Mr. O. *Anderdon* for the Plaintiffs.

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Mr. *Koe* for the Defendant *De Tastet*.

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The other Defendant did not appear.

The MASTER of the ROLLS. The Plaintiff received these goods as the private agent of Messrs. *Bize, Bordenave, and Co.* The possession of the agent is the possession of the principal. On the transfer to *De Tastet* the Plaintiffs acknowledged themselves to be his agents. I am not aware of any instance of a bill of interpleader being sustained by a private agent. It is a very important point, and I permit the counsel to look into the authorities, and mention the result on *Monday next*.

Mr. O. *Anderdon* for the Plaintiffs.

Nov. 16.

This bill has been filed by warehousemen, whom I cannot represent in any other character than that of agents. The wool was consigned by *Cabanon* to *Bize, Bordenave, and Co.*, and after the latter had caused the wool to be transferred to the Defendant *De Tastet*, the Defendant *Cabanon* claimed the goods as the owner; and in consequence of the lien claimed by *De Tastet*, it appears that there are in this case those conflicting claims arising out of the acts of the parties respecting which the parties ought to be compelled to interplead in this court. Mr. *De Tastet* being a partner with *Bize, Bordenave, and Co.*, this comes within the case of conflicting claims in which the holder of the goods can maintain a bill of interpleader. In the case of *Nicholson v. Knowles* (a) the Vice-Chancellor decided upon the principle of the

(a) 5 *Mad.* 47.

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cases of *Dickenson v. Hammond* (a) and *Roberts v. Ogilvie* (b), that an agent to receive particular monies cannot dispute the authority of his principal and set up inconsistent claims of third persons; but in such cases the receiver of the money would not be liable to an action at the suit of the parties who might be rightfully entitled to it. The Plaintiffs ought to be protected in this Court, because their delivery of the goods to *De Tastet* would not be an answer to the action of *Cabanon*, if *De Tastet* were not entitled to retain them.

Mr. Koe, referring to the statement that *De Tastet* was a partner with *Bize, Bordenave, and Co.*, objected, that it was not stated in the bill that *De Tastet* was a partner; but the Master of the Rolls thought that the Plaintiff was entitled to read the fact from the Defendant's answer.

Mr. O. Anderdon. In *Lowe and Richardson v.* — (c), it was laid down, that “although a captain might file a bill of interpleader where parties claimed adversely at law or in equity under a bill of lading, yet the Vice-Chancellor doubted whether he should in any case file a bill of interpleader where the adverse claims were not under the bill of lading, but paramount to it. Delivery according to the bill of lading would fully justify the captain, and those who alleged an equity paramount to the bill of lading should assert it by a suit of their own.” This appears to furnish the distinction. In *Dowson v. Hardcastle* (d) the plaintiffs were wharfingers, and the other parties were the consignor and consignee, and vendees of the goods, it was held that that was a proper case for a bill of interpleader. So, in *Edenson* and

(a) 2 B. & A. 310.

(c) 3 Mad. 277.

(b) 9 Price, 269.

(d) 2 Cox, 278.

Roberts (a), which was the case of a bill of interpleader by a factor, against many defendants who had claimed the goods, in which the authority of the preceding case was recognized and followed. *Martinius v. Helmuth (b)*, before Lord *Eldon*, is a strong case to support this bill; and there are other analogous cases. (c)

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The MASTER of the ROLLS. You cite many cases; but how do you state the principle?

Mr. O. Anderdon. Wherever conflicting claims are raised to property in the possession of a depositary arising out of the acts of the parties claiming derivatively and in privity, he, not having the means of ascertaining in whom the right resides, is entitled to the assistance of a court of equity.

The MASTER of the ROLLS. Must not an agent account to his principal? How can a stranger maintain an action against an agent, if the latter deliver the goods deposited with him to his principal?

Mr. O. Anderdon. Unless an agent is held to be not liable to an action of trover by a consignor, he ought to have protection here. In the case of *Stevens v. Elwall (d)*, a servant was held to be liable to an action of trover. In the case now before the Court, the parties who are Defendants claim under one title; and seeing the privity which exists between them, it is submitted that this bill can be maintained.

(a) 3 Cox, 280.

(b) Reported in a note, 2 Ves. & Bea. 407., 2d edition, and in Cooper, 245.

(c) The cases of *The East India Company v. Bazett*, 1 Jacob, 91.; *Stevenson v. Anderson*, 2 Ves. & B. 407.; *Martinius v. Helmuth*, *ibid.* in note; and *The East India Company v. Edwards*, 18 Ves. 376.

(d) 4 M. & S. 259.

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The MASTER of the ROLLS. The wool being deposited in a warehouse, the warehouseman becomes the agent of the principal, but if deposited in a bonded warehouse, the holder is the agent of the person entitled. When under the authority of the crown, the warehouseman is not a private agent, but a public warehouseman. The difference is, whether it is a warehouse or a public bonded warehouse.

(It was intimated to the Court that the Plaintiffs' warehouses were bonded warehouses.)

Mr. Koe. But it is stated on the record to be a private warehouse; that the Plaintiffs carry on the business of warehousemen. There is nothing on the bill to shew that this is a public bonded warehouse. It has been dealt with throughout as a private warehouse.

The MASTER of the ROLLS. Where would be the use of dismissing this bill, when another bill on the ground that the Plaintiffs is a public bonded warehouse may be brought to-morrow? If this be a private warehouse, the possession would be in *De Tastet*. If the Plaintiffs are merely private agents, I am of opinion that they cannot file a bill of interpleader, but if they are public agents, they can file it. The agent of a bonded warehouse must be like the *London Dock Company*, who are public agents.

The cause then stood over, to enable the Plaintiffs to make such application with reference to the fact of the Plaintiffs' warehouse being bonded as they should be advised.

Nov. 27.

Mr. O. Anderdon stated, that with reference to this case he found that the goods were not deposited with the Plaintiffs as bonded goods.

The MASTER of the ROLLS. Then the Plaintiffs are only private agents, and in that character they cannot sustain a bill of interpleader.

Bill dismissed with costs.

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BINGHAM v. WOODGATE,

WESTMINSTER
HALL.
Nov. 9.

HUDLESTONE v. CORBETT.

SEVERAL lots of land were purchased at a sale before the Master in these causes, by *Lowther Augustus John Lord Muncaster*, and the Master was of opinion that a good title could be made thereto. Lord *Muncaster* carried in objections to the report, which were disallowed, and he thereupon obtained an order that he should be at liberty to file exceptions, which he accordingly did, that a good title could not be made. In fact, this objection amounted to a claim by his Lordship to the estates of which those lots formed part. The following are the facts.

Customary estates.

Effect of purchase of a tenement in fee by the lord, who had only a life-interest.

A lord of a customary manor for life only, purchased a tenement in the manor in fee, by conveyance and surrender. The mode of transmission of lands in the manor was by conveyance and surrender. The lord died, leaving only a daughter. The

By the settlement, bearing date the 14th of *July* 1778, made on the marriage of *John Pennington, Esq.*, and *Penelope Compton*, the manor of *Muncaster* and other manors therein mentioned, and all head rents, quit rents, of freehold, customary, and copyhold tenants, fee-farm rents, and all other rents, rights, royalties, fisheries,

manor, by the settlement under which he held it for life, was limited in default of sons in remainder to his brother; and the manor went over to the brother:

Held, that the usual mode of passing estates being by common-law conveyance, the freehold was in the tenant.

Held, that on the death of the lord the tenement descended to his daughter, his heiress at law.

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profits, and appurtenances whatsoever to the said manors belonging, were limited to the use of *John Pennington* and his assigns for life; with remainder to the sons of the marriage in tail-male; with remainder to *Lowther Pennington* in strict settlement; remainder over. *John Pennington* was afterwards created Lord *Muncaster*, and was the testator mentioned in this cause.

As to the customary Part of Lot 3.

By a customary conveyance, dated 2d *February* 1787, *Robert Dixon* conveyed a customary estate held of the said manor to the use of the testator, his heirs and assigns for ever.

The same day, at a court held for the manor, the said *Robert Dixon* surrendered the said customary estate to the use of the said testator, his heirs and assigns for ever.

By an indenture dated 2d *February* 1797, the testator granted, bargained, sold, and demised (*inter alia*) the said customary estate, by the description of all that other freehold messuage, &c. called "*Lowestholme*, which was theretofore the estate of *Robert Dixon*," to *Cuthbert Atkinson*, his executors, administrators, and assigns, for 1000 years, subject to a proviso for *cesser* of the term on payment by the testator, his executors, or administrators, unto the said *Cuthbert Atkinson*, his executors, administrators, or assigns, of 2000*l.* and interest on the 2d *February* 1798. And the said deed contained (amongst other covenants) a covenant by the testator that he was seised in fee.

This deed had been cancelled; and upon it was written the following memorandum: "I have cancelled the

above mortgage with my own hands. Cancelled the 10th *November* 1813. *C. Atkinson.*"

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By an indenture of 3d *February* 1812, the testator charged the estate comprised in the said mortgage with the payment of the further sum of 1500*l.* to the said *C. Atkinson.* This deed was also cancelled, and a memorandum similar to the last written thereon, and signed by the said *C. Atkinson.*

The testator, by his will dated the 11th *April* 1812, devised all his manors and real estate to trustees, in trust to sell the same for the payment of his debts and other purposes.

The testator dying in *October* 1813, without male issue, his brother, *Lowther Pennington*, succeeded to the title, and also to the possession of the settled estates as tenant for life under the deeds of the 13th and 14th *July* 1778. The testator had, however, one daughter, who had been married to Lord *Lindsay*, now Earl of *Balcarras*.

Lowther Lord Muncaster died in 1818, and his son *Lowther Augustus John* (then an infant) succeeded to the title, and also to the settled estates, as tenant in tail under the settlement of 1778.

Lowther Augustus John Lord Muncaster having been made a ward of the Court of Chancery, *Ralph Creyke*, Esq. was appointed receiver of his estates, and empowered to hold the courts for the several manors to which his Lordship became entitled upon his father's death.

At a court held, 4th *December* 1818, for the manor of *Muncaster*, before the said *Ralph Creyke*, Lady *Lindsay* claimed to be admitted, *by descent from her late father*,

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to the premises forming the customary part of lot 3. And having paid her fine, she was admitted tenant thereto accordingly, to hold to her, her heirs and assigns, "according to the custom of the manor," yielding and performing to *Lowther Augustus John Lord Muncaster*, lord of the said manor, his heirs and assigns, all rents, &c. usual and accustomed.

Lady Lindsay was considered to be the person entitled to be admitted as the customary heiress to her father, a doubt being entertained whether the customary estates passed to the trustees by the devise in the will.

During the lifetime of *Lowther Lord Muncaster* no admission to the property took place; and, as in consequence of this omission, the payment of a fine had been avoided (the custom authorising a fine being taken both upon a change of tenant and the death of the lord), *Lady Lindsay* was called upon to be admitted to the property a second time, with a view to the payment of the fine which had been payable upon the late lord's death. The following admission accordingly took place.

At a court held, 21st *July* 1819, before *Richard Taylor* as deputy to the said *Ralph Creyke*, *Lady Lindsay* was admitted to the said customary premises upon the death of *Lowther Lord Muncaster*, "the last general admitting lord," to hold to her, her heirs and assigns, according to the custom of the manor. And she paid the customary fine and expenses thereon.

As to Lot 4.

By a customary conveyance of 1st *August* 1807, *Christopher Brockbank* conveyed his customary estate,

held of the said manor of *Muncaster*, to the use of the testator in fee.

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At a court held the same day, the said *Christopher Brockbank* surrendered his said customary estate to the testator, his heirs and assigns, according to the custom of the said manor.

At a court held 6th *March* 1817, *Lowther* Lord *Muncaster* being then the lord of the said manor, Lady *Lindsay* claimed to be admitted, "by descent from her late father," to the said customary estate, and having paid her fine she was admitted tenant thereto, to hold to her, her heirs and assigns, according to the custom of the manor, yielding unto the said *Lowther* Lord *Muncaster* all rents, fines, &c. due and payable.

On the 17th *March* 1817, Lady *Lindsay* having agreed to relinquish all claim to this customary estate in favour of the creditors of the testator, at a court held on that day, she surrendered the same estate to the use of *Richard Taylor* in fee, for the purpose of enabling him to convey the same to a purchaser, or otherwise to dispose thereof as circumstances might thereafter require, without further application to her.

On the same day a customary conveyance of the same estate was executed by Lady *Lindsay* to the said *Richard Taylor*.

On the same day the said *Richard Taylor* was admitted in fee to the same customary estate, pursuant to the said surrender, and paid a fine thereon.

In 1818 *Lowther* Lord *Muncaster* died.

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At a court held 21st *July* 1819 for the said manor, before the said *R. Creyke*, as steward and receiver of the then Lord *Muncaster* appointed by the Court of Chancery, the said *Richard Taylor* claimed to be admitted to the said customary estate upon the death of *Lowther* Lord *Muncaster*, the last general admitting lord, and having paid his fine, was admitted tenant thereto accordingly.

As to Lot 5.

By a customary conveyance of the 19th *February* 1809, *William Thompson* and *Anne Thompson* conveyed their customary estate, held of the said manor of *Muncaster*, to the use of the testator in fee.

At a court held the same day, the said *William Thompson* surrendered the said premises to the said testator, his heirs and assigns, for ever.

At a court held 6th *March* 1817 (*Lowther* Lord *Muncaster* being lord of the manor) Lady *Lindsay* was admitted, by descent from her late father, to the said customary estate, and paid her fine.

On the 17th *March* 1817 Lady *Lindsay* surrendered to the use of the said *Richard Taylor*.

The same day a customary conveyance thereof from Lady *Lindsay* to *Richard Taylor*.

The same day *Richard Taylor* was admitted, and paid his fine.

In 1818 *Lowther* Lord *Muncaster* died.

On the 21st *July* 1819 *Richard Taylor* was admitted upon *Lowther Lord Muncaster's* death.

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The following is the certificate of the steward of the manor as to the customary form on which grants were made : —

“ *Muncaster Castle, July 24. 1828.*

“ Sir, — The custom of the manor of *Muncaster* in all cases requires a customary tenant, on disposing of his customary estate, to execute a conveyance to the purchaser, in addition to the surrender and admission.

“ On the lord of the manor of *Muncaster* becoming possessed of any customary estate within the manor the same would become free, and if regranted to any one, would require a deed of conveyance, but no admission ; this if the lord *had the perpetual right in the manor.*

“ I cannot find a single instance where the lord of the manor of *Muncaster, holding in perpetuity*, has ever regranted a customary estate within the manor that they became possessed of : every purchase that has been made is still held in the family.

“ The above is the custom of the manor of *Muncaster.*

“ I am, &c.

“ RICHARD TAYLOR,

“ Steward of the said manor.

“ To *G. Bramwell, Esq., Temple.*”

Mr. *Stuart* in support of the exceptions. *John Lord Muncaster* was tenant for life of the manor, and being so, he purchased one of the estates in it, which was conveyed to him in fee. Subsequently to his death his heiress was admitted, and it is said that this is a new

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grant. The question is, whether this land is not become parcel of the manor. Is this within the principle of law laid down in *St. Paul's v. Lord Dudley and Ward*? (a) The property there was copyhold; in this it is customary freehold; and unless the counsel on the other side can shew there is a difference in the two tenures applicable to this question, the principle in that case must prevail. In that case Lord Eldon said that the legal effect of the tenant for life of the manor taking the surrender of a copyhold to him and his heirs was that the copyhold became parcel of the manor. The equity in that case was in favour of a mortgagee, and he would be entitled to more favour than an heir at law. Now surely the mere admission by the steward, without a grant, could not affect the question. It may be said that, with respect to customary freehold, the freehold is not in the lord, but in the tenant. The question arose in *Doe d. Cook v. Danvers* (b), in which Lord Ellenborough stated that the estate appearing by the cases to be parcel of the manor, to be holden by copy of court-roll, and to pass by surrender and admittance, the Court held that, whether holden at the will of the lord or not, the freehold was in the lord, and not in the tenant. There must be in the lord a higher interest than in the tenant. It is enough, in order to apply the doctrine of *merger* or extinguishment, that the lord has a higher interest. He being seised of the manor of which the lands are holden, the doctrine of extinguishment must apply. Then it is said that the admission operates as a re-grant; but where, as in this case, it was a gratuitous admission by the steward during the infancy of the lord, not preceded by a grant, it would be extraordinary if the act of the steward could undo the operation of the law.

(a) 15 Ves. 167.

(b) 7 East, 299.

On the 4th of *December* 1818, and in *July* 1819, this admission took place. In 1823 *Lowther Augustus John* Lord *Muncaster* attained his majority. It may be asked, can an admission during the minority bind him? The effect of an admission was considered in *Doe d. Zouch v. Forse (a)*, where Lord *Ellenborough* says, an admittance to a copyhold does not in itself constitute a possession; it only gives the party the means of possession if he have a good title to it. Unless the erroneous admission operate as a new grant, he can have no title at all; but it would be too much to say, that that which was an admission upon a claim in a particular character, being vicious in that respect, shall operate as a new and express grant, which neither the lord nor the tenant ever contemplated at the time. And there are other cases which have also decided the point (*Holdfast d. Woolams v. Clapham. (b)*) The admittance is only a circumstance required by law merely for the sake of the lord. It is said that it is likened to confirmation at common law; but as laid down in *Shephard's Touchstone*, 313., confirmation must have something to operate upon. The admission of Lady *Lindsay* cannot have altered this question, and the exceptions to the Master's report must be allowed.

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Mr. Knight, Mr. Simpkinson, and Mr. Preston, for the Plaintiff.

Mr. Knight. These estates were held of the manor either as freehold or copyhold. It is essential to a copyhold tenure that it should be held at the will of the lord, but customary freehold is not so held. The very foundation of the case of *St. Paul's v. Lord*

(a) 7 *East*, 186.

(b) 1 *T. R.* 600.

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during the life of *A.*" If there be an estate tail in the lord, and he buys the fee of a tenancy, or *vice versa*, there is only a suspension; but the law of copyhold is different, and the lord may re-grant copyholds, though the tenement be extinguished for a time.

These are not copyhold tenements, for they are not held at the will of the lord; but the case before the Court is of customary freehold, and it is a question of fact whether the freehold be in the lord or the tenant. On the evidence of this title, the freehold is in the tenant. There could have been a suspension only of the tenement during the time it was in the lord. The conveyance is in this case by bargain and sale, and that is not a mode of conveying a copyholds. A use may be limited on a bargain and sale made under the custom of *London*, for it is a common law conveyance. It is impossible to read the passages on copyhold in *Blackstone*, and not to conclude, that in *Bracton's* time, the customary tenants of this description had the freehold. It was only for election purposes, that the contrary was declared by the legislature. The forms of grants in these manors, which are certified, is, that there must be a *customary* conveyance previous to surrender and admission. In *Crowther v. Oldfield (a)*, the doctrine laid down by Lord *Holt* was, "That the customary freeholder was admitted *ad consuetudinem manerii*, and not *ad voluntatem domini*, as a copyholder was. The copyholder was in by demise from the lord. But in the case of customary freeholds, the lord was only an instrument; and in pleading a title to a copyhold estate, it was sufficient to shew a grant from the lord; but in the other case, it was not enough to shew

(a) 1 *Salk.* 364.

that the lord granted, or that it was surrendered to the lord, and he granted, but it must be shewn that the surrenderor was seised in fee, and surrendered to the lord, and he granted." As to customary freeholds, there must be a deduction of title by conveyances, as in cases of freehold by socage tenure. In a case in the Court of King's Bench, the law was collected and stated by Mr. Justice *Holroyd*, then at the bar. In argument he observed, "There is one most particular circumstance regarding copyholds, which does not apply to customary freeholds—it is, that the lord of a copyhold may re-grant a copyhold, and if this were copyhold, it would have passed by the re-grant; but there is not any case of a lord in fee of a customary freehold purchasing a tenement in fee, where it was held that he could re-grant it." It is impossible he could re-grant, the custom is extinguished by the union. What follows? If there be an extinguishment, it cannot be qualified. But can any thing be so absurd, than that where a tenant for life of a manor purchases a tenement in fee, there shall be an extinguishment and a right to regrant. It would be injustice in the highest degree. That there is only a suspension, is established by the authorities. *Littleton*, at sect. 560, says, 'If there be lord and tenant, and the tenant grant the tenement to a man for the term of his life, the remainder to another in fee, if the lord grant the services to the tenant for life in fee, in this case, the tenant for the term of life hath a fee in the services, but the services are put in suspense during his life, but the heirs of tenant for life shall have the services after his decease;' and in *Comyns's Digest*, title *Suspension*, the law is thus stated, 'If *A.* be tenant for life, remainder to *B.* in fee, and the lord grants his services to *A.* in fee, they are suspended during the life of *A.*'"

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This tenement is not copyhold, it is held by deed, the freehold is in the tenant; but whether it be or not, this is not copyhold (the steward's certificate was here read). Extinguishment cannot be completed unless the estates are co-equal. The lord can no longer, under the statute *quid emptores* re-grant to be held of the manor, *Doe dem. Newby v. Jackson.* (a)

The MASTER of the ROLLS. That is obviously what the steward means, for he says it requires no admission.

Mr. Preston. If the tenancy be extinguished, every one must feel the hardship of the case before the Court. The moment this property is treated as a customary freehold, whether the freehold be in lord or tenant, the law of copyholds cannot apply. The title of the tenant is by conveyance. The tenement was suspended during the life of the lord. On the death of tenant for life, the tenement would revert to his heir.

Mr. Roupell and *Mr. Lynch* in the same interest. The freehold being in the tenant, the law relating to copyhold cannot apply; and there could only have been a suspension, not an extinguishment.

The MASTER of the ROLLS. The admission of Lady *Lindsay* could not be a re-grant. It was only an admission, unless it could be shewn that there was a custom in the manor that it could be a re-grant. I must take this property to be a freehold, from the certificate of the steward.

(a) 1 B. & C. 455.

Mr. *Pepys*, in reply. In *Doe v. Danvers*, the tenement was not held at the will of the lord, but that is merely a form. In both instances the custom of the manor prevails. There is no distinction between this case and that of Lord *Dudley* and *St. Paul's*. The conveyance to Lord *Muncaster* is thus worded, "bargain, sell, and surrender." A lord of a copyhold manor may sell any tenement in his hands by deed, but that would be enfranchisement. (*Doe dem. Reay v. Huntingdon.* (a)) Lord *Muncaster* appearing here as a purchaser, is entitled to the same title as any other purchaser would be. I apprehend the admission of Lady *Lindsay* could have no effect. It was the admission of a person who had no title; unless a distinction can be drawn between customary freeholds and copyholds the case of *St. Paul's* and Lord *Dudley* must apply.

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The MASTER of the ROLLS said, that he must consider this case as if Lord *Muncaster* were not the purchaser. In this case, the lord of a manor, who was tenant for life only, with remainders over, purchased three customary tenements which were held of the manor, and those tenements were passed to him by a conveyance of bargain and sale, and by surrender, it being the custom of the manor that such customary tenements should pass by bargain and sale, and surrender and admittance, admittance not being necessary where the lord is a party. These three tenements had been sold before the Master, under a decree of this Court, as being part of the estate of the lord tenant for life, who purchased them: and on a reference to the Master as to the title of those tenements, the Master has reported that a good title can be made, and

(a) 4 *East*, 271.

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an exception is taken to the report, on which exception judgment is now to be given. As it is admitted that a bargain and sale is absolutely necessary, in order to pass the interest in these customary tenements, it necessarily follows, in my apprehension, that they are freehold, otherwise it would be impossible that a bargain and sale should be necessary in order to pass the interest in the property. Considering these to be freehold in point of interest, it follows that the cases of *St. Paul v. Lord Dudley*, and *Doe v. Danvers*, have no application. In both these cases, there was no freehold interest in the tenements purchased. Assuming, therefore, as clear, that these tenements were freehold, the simple question is, What is the effect of the union of the customary tenements in fee, with the interest of the lord who is tenant for life only? If the lord had been tenant in fee of the manor, then the purchase of those customary tenements in fee would undoubtedly have extinguished the customary tenement, and made it parcel of the manor so as to pass with the manor; but extinguishment takes place only when both estates have the same duration, and inasmuch as the lord when he purchased the customary tenements was tenant for life only, it was no extinguishment, but it was a suspension of the seignory during the life of the lord, and this seignory would necessarily survive to the remainder-man on the death of the lord; and on the death of the lord, it appears to me quite clear, that those customary tenements would descend to the heir of the lord; and undoubtedly the heir of the lord, according to the custom of the manor, would require admittance to perfect the title. Admittance in this case has been had. I am of opinion, therefore, that the Master was perfectly right in the conclusion which he has adopted; and I must overrule this exception. The doctrine of suspension and extin-

guishment is very fully stated by *Littleton* in sections 559, 560, 561.

Overruled with costs.
Reg. Lib. A. 129. fol. 164.

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The Rev. EDWARD DAVIES and MARY ANN WESTMINSTER
his Wife, - - - Plaintiffs; HALL.
Nov. 28.

AND

JOHN SPURLING the Elder, BENJAMIN COL-
CHESTER, JOHN SPURLING the Younger,
and WILLIAM BRADEY, - Defendants.

WHIMPER BRADEY, by his will bearing date the 3d June 1809, gave all his freehold and copyhold lands, except his freehold and copyhold parts of the church farm, (to which they were entitled in moieties in fee,) unto his brother *John Bradey* for his life; with remainder to the Plaintiff *Mary Ann Davies*, then of the age of four years, in tail general. The testator then declares, that if his brother should be minded to sell the church farm, he empowered him to sell all his parts and shares thereof; and if the same should not be sold in his lifetime, then the testator directed and empowered the

Avoiding release.
Opening accounts.
Fraud and surprise.
Liability of executors.
Error detected and settled before suit.
Costs.
Evidence.
Reading answers.

Accounts having been settled, and a release executed, in order to avoid the latter, and obtain an account in this court, the Plaintiff must establish either fraud or surprise.

One of several executors receiving part of the personal estate, which he hands to his co-executor, who wastes the estate, still remains personally liable; but because he happens to be executor, he is not liable for monies which he received for the purchase of a freehold estate of the testator, and which he received as the agent of another person empowered by the will to sell it, to whom he had paid over the amount, but is perfectly justified in so paying it over.

In order to induce the Court to give a decree to surcharge and falsify, some one mistake must be shewn.

If an error is detected, and settled before the institution of a suit, it is not a foundation for a decree to surcharge and falsify.

Bill seeking relief on the ground of fraud or surprise — Plaintiff failing to establish either — dismissed with costs.

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surviving executors, as soon as might be after his brother's death, to sell and convey the same premises. The produce to be applied in like manner as the testator's personal estate. And the testator gave all his goods, chattels, and personal estate, and also the clear money arising by the said sale, unto his brother *John Bradey* for his life, and after his death unto the Plaintiff *Mary Ann Davies*. The testator appointed *John Bradey*, and Defendants, *John Spurling* and *Benjamin Colchester*, executors of his will, and as far as by law he could, the testator committed to Defendants *Spurling* and *Colchester* the custody and tuition of the Plaintiff *Mary Ann Davies*, and the management and improvement of the real and personal estate by him devised and bequeathed to her, and the application thereof at their discretion, for her maintenance and education during her minority. Testator gave to *Spurling* and *Colchester* 50*l.* a-piece for their trouble.

The testator died in *February* 1817, and his will was proved by the three executors.

John Bradey sold the church farm for 6450*l.*

Benjamin Colchester, being by trade an auctioneer, sold the estate and received the purchase-money.

John Bradey, by his will bearing date the 17th day of *May* 1821, gave the greater part of his lands unto the Defendants, *Colchester*, and *Spurling* the younger, to the use of them and their heirs, during the life of the Plaintiff *Mary Ann Davies*, upon trust to pay her the rents independent of her husband; and after her decease, to the use of her children, or more remote issue as she should appoint; and in default of appointment, to the children in fee, with an executory devise over.

The testator gave his personal estate to the Plaintiff *Mary Ann Davies*, to be paid to her when she should attain twenty-one; a competent part to be applied to her maintenance and education during her minority.

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Spurling the elder, *Colchester*, and *Spurling* the younger, were appointed executors and guardians of the Plaintiff *Mary Ann Davies* during her minority. On the death of *John Bradey* his executors duly proved his will, and the Plaintiff *Mary Ann* was then sixteen years of age.

John Bradey, up to his death, occupied and farmed a copyhold estate called *Hollesly*, which, in the lifetime of *Whimper Bradey*, was their joint property.

In *August* 1821, an amicable suit was instituted in Chancery, for establishing the will and executing the trusts under which *Spurling* the elder, *Colchester*, and *Spurling* the younger were, by the Court, appointed guardians of the Plaintiff *Mary Ann Davies*.

The executors of *John Bradey* put in their answer with schedules of accounts, but no further proceedings were had in the suit. *Mary Ann Davies*, on attaining twenty-one, married the Plaintiff, the Rev. *Edward Davies*.

This bill stated the preceding facts, and charged that a release given by the Plaintiffs was executed through fear and misrepresentation, and prayed that the wills of *Whimper Bradey* and *John Bradey* might be established, and the trusts carried into execution, and that the settlement of accounts, and the release might be declared fraudulent and void.

It was stated in the answers, that *John Bradey* alone, during his life, acted as executor and trustee of the will

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of *Whimper Bradey*, and that *Spurling* the elder and *Colchester* never in any manner acted or interfered in the execution of the will of *Whimper Bradey*, except by joining with him in signing the residuary account rendered to the stamp-office; that *Benjamin Colchester* was an auctioneer, and was employed by *John Bradey* to sell the estate, and he did sell it for 6450*l.*, which he paid into the bank at *Woodridge* to the account of *John Bradey*. *John Bradey*, by his cheque on that bank, paid *Spurling* the elder the sum of 2800*l.* in discharge of four bonds to that amount, entered into to him by *Whimper Bradey* and *John Bradey*.

The answers further state, that on the 9th *February* 1826, the accounts were investigated by *Wm. Chapman* on the part of the Plaintiffs; and that thereby the sum of 666*l.* 6*s.* 7*d.* appeared to be due to the Plaintiff *Mrs. Davies*, exclusive of 700*l.* 3 per cent. consols; that a draft of the release was on the 15th *February* delivered to *Mr. H. G. Day*, the then solicitor of the Plaintiff *Edward Davies*. That the parties and the Plaintiffs' accountant, *Mr. Chapman*, met again on the 17th *February*, when *Mr. Davies* signed a memorandum at the foot of the draft as follows: "I have heard this draft release read, and do approve the same, and do undertake to execute a copy thereof when engrossed on the proper stamp. *Edward Davies*. Witness, *H. G. Day*."

Spurling the elder, and *Colchester*, at the request of the Plaintiff *Mr. Davies*, then executed a power of attorney to sell out the 700*l.* stock, in order to pay some bills of *Mrs. Davies*, and make some other necessary payments; and on the 24th day of *February* 1826 the accounts, with the subsequent receipt and payments, were fully gone into and settled, the release executed, and the balance paid to the Plaintiffs.

These statements in the answer were supported by evidence.

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At the foot of the accounts then produced there was written the following memorandum : —

“ The foregoing accounts in this book having been examined by Mr. *William Chapman* on our behalf, and we being satisfied therewith, and having this day received the balance of 358*l.* 8*s.* 2*d.* from the executors, do hereby allow the said accounts. As witness our hands, this 24th day of *February* 1826.”

The Plaintiffs’ attorney was present, and the Plaintiffs signed this memorandum.

It appeared also in the answer of *Colchester*, that the Defendant *Colchester* had received from *John Bradey* the sum of 177*l.*, with which he was to purchase two cows for a relation of *John Bradey*, and to make some other payments; the remainder he was to keep to himself; and this Defendant stated in his answer that he found a paper, which he set forth, amongst the papers of *John Bradey* to that effect; but in the month of *March* 1826, considering that he ought to communicate the fact to the Plaintiffs, he went to their solicitor, and stated all the circumstances to him, offering to do as Mr. *Davies* wished. Mr. *Davies* wished to receive the balance, amounting to 192*l.*, and that sum, with interest, was paid to him in *April*.

The evidence that was material is fully stated by the Master of the Rolls in his judgment.

Mr. *Bickersteth* and Mr. *Parker* for the Plaintiffs.

Mr. *Knight* and Mr. *Turner* for the Defendants.

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How answers
are to be read.

Whilst counsel were reading evidence from the answer at considerable length, the Master of the Rolls stated that there had been great abuses in the modern practice regarding answers. If, said His Honor, the plaintiff reads a particular passage, and the defendant refers in the same passage to matter that is explanatory, the defendant has a right to read the explanatory matter; but unless the sense be connected, it is not necessary to read on merely because such words as "but," "however," "and" were used.

It was stated by the counsel on both sides, that very considerable expense was incurred in the examination of witnesses, by reason of the mode which for some time had been adopted in drawing answers, by connecting various passages, however independent the facts contained in them were of each other. And all the counsel expressed their satisfaction that the Court had laid down a rule upon the subject.

His Honor afterwards added, if you read a passage in an answer to charge the defendant, and it is by a connecting passage satisfactorily met by the defendant, you must discharge him by the same answer.

The MASTER of the ROLLS. This is a bill filed by the Plaintiffs for the purpose of avoiding a release which they have executed on the settlement of accounts between the Plaintiffs and the Defendants, and of having the accounts retaken under the decree of this Court.

In order to avoid the release, and to obtain an account under the decree of this Court, it is necessary that the Plaintiffs should establish that there was either fraud or surprise in the settlement of the accounts upon which the release proceeds.

Surprise is certainly not established in this case, because previous to the execution of this release, namely, on the 10th *February* 1826, the accounts were examined by an agent appointed on the part of the Plaintiffs for that purpose, and with those accounts they expressed themselves perfectly satisfied. Subsequently, about seven days afterwards, a draft of the intended release proceeding upon that settlement of accounts, was approved by the solicitor of the Plaintiffs, and the release was afterwards executed, on the 24th *February*, in the presence of that solicitor for the Plaintiffs who had approved of the draft of the release. There is, therefore, no ground to state that this release on the settlement of the accounts proceeded upon surprise. The remaining question for the purpose of opening the accounts is, whether it proceeded upon any fraud upon the part of the Defendants.

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It is said to be plain that there was fraud on the part of the Defendants, because on the day that this release was executed, namely, on the 24th *February*, there was a written assurance on the part of the Defendants that the accounts which ascertained the balance stated in the release had been fully examined by a Mr. *Chapman*, and approved by him; and that it was in consequence of that examination and approval, that the Plaintiffs did in fact execute the release. But it does appear to me that this was no fraud on the part of the Defendants, nor did it in any manner mislead the Plaintiffs, or induce the Plaintiffs to sign the release in question.

Mr. *Chapman* had examined these accounts, as he says, on the 10th *February*, as it is proved by other witnesses, the examination took place on the 9th *February*, and in his examination he states a balance of 700*l.* and a fraction as being then the result of the accounts. The balance as stated by Mr. *Chapman*, is a

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balance which does appear to have been due from the Defendants up to that 9th *February* upon the account on which his examination proceeded, and there is in that respect, therefore, no difference between the parties. The balance that was actually due on the 24th, when the release was executed, was a different balance from that which was stated by *Chapman*, there having been additional articles on both sides of the account. Now it appears that the Plaintiffs were perfectly well aware that there were such additional articles on both sides of the account. In truth those additional articles were the result of a desire expressed by the Plaintiff, Mr. *Davies*, that certain debts which had been incurred by his wife and co-plaintiff should be discharged before the final settlement of the accounts and the execution of the release took place. It appears to have been stated, that Mrs. *Davies* had incurred certain debts to the amount of 200*l.* or 300*l.*, and it was then made a question, Whether the settlement of the accounts should be concluded, and it should be left to Mr. *Davies*, he being then married, to pay those debts, or whether those debts should be paid by the Defendants, the executors? And it was at the request of Mr. *Davies* himself that the executors undertook the payment of those debts. Now, in order to pay those debts, it was necessary to provide means: it became necessary to sell a certain sum of stock which stood in the names of the executors, and with that stock those debts were paid. The additional articles to the account are, therefore, on the one side, the money produced by the sale of that stock, and on the other side the application of those monies to the payment of the debts. It appears that those additional articles were submitted to Mr. *Day*, the solicitor on the part of the Plaintiffs; that he was fully apprized of them; and that they were fully explained to *Davies* himself on the day that he executed

the release. In this respect, therefore, although the memorandum is certainly incorrect—because, according to the memorandum, the whole accounts had been examined by *Chapman*, whereas in fact the accounts examined by him extended only to the 9th *February*, and not to those additional articles—yet it is plain that the parties were fully aware that by the examination of the accounts by *Mr. Chapman*, was meant that examination only which *Mr. Chapman* had actually made, and that it was not meant to include those additional articles which had been inserted principally at the request of the Plaintiff himself after the examination by *Mr. Chapman*. On this ground, therefore, it is not to be stated that there was any fraud. It is said, however, that there was fraud, because the Plaintiff, *Mrs. Davies*, was entitled not only to an account of the estate of *John Bradey*, but an account of the estate of *Whimper Bradey*, and that the only account which *Mr. Chapman* examined was the account of the estate of *John Bradey*, and the information, therefore, with respect to the estate of *Whimper Bradey*, to which she was entitled, was not duly afforded. It appears from the evidence that *John Bradey* was one of the executors of *Whimper Bradey*, with two of the Defendants, and that he was in truth the sole acting executor of *Whimper Bradey*; that he possessed the whole of his property, and alone administered that property. It is quite immaterial, therefore, whether there was any correct examination of the accounts of the estate of *Whimper Bradey*, because as *John Bradey* had alone administered that estate, whether he had administered it properly or improperly, he was the person whose assets must answer for his administration; and if the whole of the assets were administered, it was perfectly immaterial what had been the administration of the estate of *Whimper Bradey*.

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Then, let it be said that his administration was most incorrect, the estate of *John Bradey* must answer for that incorrectness. It could answer for that incorrectness only to the extent of his property, and the account of the estate of *John Bradey*, therefore, would be all the Plaintiffs could obtain, whatever had been the mal-administration of the estate of *Whimper Bradey*. It is not stated in the evidence, but it is perfectly manifest that it must have been fully explained to the Plaintiffs, because the release itself purports to be a release, not as to the estate of *John Bradey* alone, upon whose accounts the release proceeded, but as to the estate of *Whimper Bradey* also. Now, the Plaintiffs could never have executed that release, taking the balance of *John Bradey's* estate as the balance of the two estates, except the circumstance which I have stated had been fully explained to them, and the extent of that demand had been shewn to be necessarily confined to such balance as should appear to be due from the estate of *John Bradey*. All the information, therefore, that was essential to the justice of the case must, upon the facts, be taken to have been given to the Plaintiffs before they executed this release. But it is said, although the Plaintiffs might have no remedy with respect to the administration of *John Bradey* except to the extent of the property, and taking the whole of his property they could take nothing else as it regarded him, yet still there might have been a mal-administration on the part of the executors, which would have made the executors personally liable; and the material ground upon which that statement is made raises a question of some nicety and difficulty. *Whimper Bradey* and *John Bradey* had been partners in their farming concerns. They were partners in the property upon which those farming concerns were conducted. They had in moieties a considerable estate.

Whimper Bradey, by his will, making *John Bradey* one of his executors, also gave him a power to sell the moiety of an estate which they held jointly, for the purpose of converting it into personal estate, and *John*, after the death of *Whimper Bradey*, accordingly executes that power. He sells that moiety of the estate, and he sells also his own moiety of the estate. He puts up the whole estate to sale, and it produces a sum of 6450*l*. In this sale he employs one of the Defendants, who was a co-executor with him under the will of *Whimper Bradey*, and was an auctioneer. He employs him for the purpose of the sale of this estate. It so happens, that there is no price bid at the auction which is thought a reasonable price for this property, and it is afterwards sold by private contract by the Defendant, the auctioneer; who is subsequently employed by *John Bradey*, as his agent, to receive the money from the purchaser; he accordingly does receive the 6450*l*. and pays it over to *John Bradey*.

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Now it is said, that, having received this 6450*l*., and being an executor under the will of *Whimper Bradey*, who had desired that his moiety of the estate might be converted into personal estate, he ought never to have parted with the produce of that moiety which *Whimper Bradey's* share had produced, but that he should have retained it as executor under *Whimper Bradey's* will, for the purposes of his will, to be administered in the payment of his debts; and that, having paid it over to *John Bradey*, if *John Bradey* had been guilty of any mal-administration of this property, so handed over to him by his co-executor, he, as co-executor, was to be answerable for *John Bradey's* mal-administration. Now it is extremely true, and perfectly well settled upon the principles of this Court, that if there be more than one executor, and one executor receives

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part of the personal estate, and afterwards hands it over to a co-executor, who wastes the property so handed over to him, the executor who did hand it over, is personally liable for the abuse of trust in the other executor; because, having once possession of the money, it was his duty to see that it was secured, so as to be properly applied in administration, and he ought not to have given to his co-executor the power to waste it.

That principle is perfectly well settled, and the question is, whether it reaches this case? The co-executor, who receives money in that character, has a legal right to retain it against his co-executor; and it being his duty to protect the property in respect of which this trust of executor is reposed in him, if he does not protect the property, but places it in a situation in which it may be wasted, then he is to be answerable; but he is to be answerable because he had the legal right to retain it, and he did not avail himself of that legal right, but handed it over to his co-executor, who wasted it. Now, had this Defendant, the auctioneer, a legal right to retain this money from *John Bradey*? He possessed it in the sole character of agent of *John Bradey*. As executor, he never could have possessed this money; it was the produce of the real estate, which partly belonged to *J. Bradey* and partly belonged to *Whimper Bradey*, who by his will had authorised *John Bradey* to sell that moiety of the estate which was his property. The auctioneer or agent, therefore, who received this money in its passage from the purchaser to the vendor, *John Bradey*, did not receive it in the character of executor. As he received it in the character of agent of *John Bradey* alone, he never could have legally retained it against *John Bradey*, if *John Bradey* had thought fit to take proceedings for the purpose of compelling him to pay to *J. Bradey*

the amount of that money. Now this being the case, I am of opinion that the auctioneer the Defendant, the co-executor, was perfectly justified in paying over the money to *John Bradey*; and that if there were any mal-administration of that property by *J. Bradey*, that he, the co-executor, is not liable in that respect.

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It was said also that there was mal-administration by *John Bradey* of his brother's estate, with respect to the payment of a certain debt due to the co-executor *Spurling*.

In order to establish that fact of mal-administration, the only evidence resorted to on the part of the Plaintiffs was the answer of the Defendant; but the answer of the Defendant, that part of it which was necessarily read, not only amounted to evidence of the existence of the debt, but of the legal right of Mr. *Spurling* to claim that debt of *John Bradey*, partly in his own right, and partly as executor to his brother, it being a joint debt due from the two brothers to *Spurling*. Now the Plaintiffs have no other evidence than the answer, and the answer discloses a case which makes out the payment to be a most correct payment. It is not necessary to make any further observations on the subject, because the evidence by which a debt is proved, at the same time proves the correctness of the transaction with respect to it. There is, therefore, not only no surprise with respect to this release, and no ground for opening the accounts on that head, but there is no fraud established, upon which the Court would be justified in avoiding the release, and in opening the accounts. But then it is said, that if the case be not sufficiently strong to open the accounts, it is yet sufficiently strong to induce the Court to give a decree to the Plaintiffs to surcharge and falsify those accounts. Now in order to induce the

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Court to make a decree that the Plaintiffs are to be at liberty to surcharge and falsify accounts, it is necessary that there should be established, in the progress of the suit, some one mistake with respect to an item in the accounts. It is not necessary for that purpose to establish more than one mistake, it being, in the view of the Court, a reasonable inference, that if there be one mistake there may be many mistakes; and the Plaintiffs, therefore, ought to have the liberty of entering fully into those accounts, with a view to proving other mistakes. It happened that Mr. *Colchester*, one of the Defendants, the executor, was also the agent of *John Bradey*. He was an agent employed by him in the management of the farming concerns, and at the death of *John Bradey* there was in his hands a sum of money, [174*l.*] which was due from Mr. *Colchester* as agent to *John Bradey*. It appears in evidence that *John Bradey* shortly before his death had told Mr. *Colchester*, that he was to make a particular application of part of this property in favour of some of his relations, and that he was to keep the residue for his own use and benefit. And it appears further, that there was found amongst the papers of *John Bradey* a written memorandum, by which Mr. *Colchester* was authorised to make these payments in favour of the relations of *John Bradey*, and was desired to retain the rest. Mr. *Colchester*, acting upon these facts, did not, when the accounts were made out, which Mr. *Chapman* examined, introduce any part of this sum of 174*l.* into the accounts; but about a fortnight afterwards he disclosed to the Plaintiffs the particulars of this transaction, and explained to them that he did not introduce that sum into the accounts, because he considered that he was acting fairly according to the directions of *John Bradey*, by retaining to his own use that part of it which *John Bradey* had not directed him to apply to the benefit of his relations; that, there-

fore, he had not introduced it into these accounts, and that there was, after the application in favour of *John Bradley's* relations, a balance of 192*l.* remaining in his hands; that if the Plaintiff (*Mr. Davies*) thought that he, *Mr. Colchester*, ought not to retain this 192*l.* for his own benefit, he was quite ready to pay it to him; and he left it to *Mr. Davies* to say how he should apply this sum of 192*l.* The Plaintiff, *Mr. Davies*, thought that, under the circumstances, he was justified in demanding from *Mr. Colchester* this 192*l.*, and it was accordingly paid to him by *Mr. Colchester* within a short period after this release was executed, and the accounts settled. Now it is said that if this 192*l.* had not been paid over before the institution of this suit, but in the progress of the suit, it would have been a plain error in *Mr. Colchester's* account that he had kept back this 192*l.*, and that if it had been established in the suit, the Court would necessarily have been driven to a decree to authorise the Plaintiff to surcharge and falsify the accounts. That is perfectly true, supposing the Court should be of opinion that *Mr. Colchester* was not justified in retaining it, and for the purpose of considering the argument of the Plaintiffs, it may be conceded that *Mr. Colchester* was not justified in retaining this 192*l.* The Plaintiff contends that it makes no difference that that sum was paid previous to the institution of the suit, because it was equally an error in these accounts; and, consequently, that notwithstanding the previous payment, the Plaintiffs are now entitled to a decree to surcharge and falsify.

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I cannot follow the reasoning of the Plaintiffs in this case. If, in the progress of a suit, an account upon which the defendants insist, is proved to be in any degree erroneous, erroneous even in any one item, then

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the plaintiffs are entitled to a decree to surcharge, and falsify; but here the Plaintiffs have not established, in the progress of this suit, that there is any error in the account.

There was originally an error in the account, but this error has not been detected in the suit; the Plaintiffs, therefore, are not relieved under the decree of the Court against this error, but by an arrangement made out of court this error has been corrected. The error having been corrected out of court, and before the institution of the suit, I am of opinion that it is not a foundation upon which the Court ever has, or ever would be justified in giving to the plaintiffs the liberty to surcharge and falsify.

Upon the whole, I am of opinion that this bill must be dismissed, and that it must be dismissed with costs.

Reg. Lib. A. 1829. fol. 170.

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BETWEEN

MARY ANN BROUGH, - - Plaintiff; WESTMINSTER
AND HALL.
Nov. 25. 24.
MARGARET ODDY, - - Defendant.

IN the month of *March* 1823, the Plaintiff held certain title deeds, which had been deposited with her by *John Brough* the elder, to whom the same belonged, under a verbal agreement that the Plaintiff should hold the same as a security, to the intent that she might have an equitable lien for a debt of 900*l.* due to her from him, with lawful interest thereon; the whole of which debt, with some interest thereon, in the month of *March* 1823, remained due to the Plaintiff. In *March* 1823 *John Brough* the younger, son of *John Brough* the elder, was desirous of raising a sum of money for his own use by the sale and grant of a life annuity, and the father agreed to join with his son in granting and giving security for the payment of such annuity. *John Brough* the younger, some few days previously to the 7th *March* 1823, on behalf and with the privity of *John Brough* the elder, requested the Plaintiff to deliver up the deeds which had been deposited with her, for the purpose of enabling him and his father to raise such intended sum of money for the use of the son, by means of the grant of an annuity which he represented he and his father were desirous to secure by an assignment of the premises comprised in such title deeds, so that such assignment might take priority over the lien of the Plaintiff on the premises. And in order to induce the Plaintiff to part with the deeds, *John Brough* the younger proposed that

Indemnity.

The Plaintiff having parted with title deeds, on which she had a lien, to enable her debtor to raise a sum of money on annuity, the Defendant, by memorandum in writing, undertook to pay that annuity to the Plaintiff, in case it should not be paid by the grantor.

The annuity fell into arrear, and the Plaintiff paid it.

On a bill for specific performance and adequate security:

Held, that, the Plaintiff having taken this personal security, a court of equity would not interfere. Bill dismissed.

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the Defendant should give an indemnity (as after mentioned) to the Plaintiff against the consequence of any default being made in payment of such intended annuity, and the Defendant consented to enter into an agreement with the Plaintiff to indemnify and guarantee her to the extent of 30*l.* per annum in the event of any default being made in payment of the annuity proposed to be charged on the premises comprised in the title deeds, in order to preserve the premises from being actually resorted to and taken by such annuitant under the trusts of the annuity deed ; the terms and provisions of which agreement were contained and specified in a letter which *Margaret Oddy* wrote and sent to the Plaintiff, which is as follows (a) : — “ *Blackheath Hill, March the 7th, 1823, Madam, At the request of my son-in-law Mr. John Brough, I beg to state that I am willing, in the event of his raising money by means of the security which you have lent to him, to become guarantee to you for the amount of 30*l.* per annum during the continuance of that bond, it being understood that in the event of Mr. Brough becoming possessed of any property in right of his wife, that property to be appropriated to the discharge of the bond, and that I shall be from that time exonerated from further responsibility ;*” which letter was signed by *Margaret Oddy*.

John Brough the younger gave the Plaintiff the following receipt for the deeds : — “ Received of Mrs. *Mary Anne Brough* the lease of all my property situated in *Islington*, which had been placed in her hands as

(a) This letter not being stamped, could not be given in evidence. The agreement was stamped with an agreement-stamp ; but it was objected by the Defendant's counsel, that it ought to have been stamped with a stamp applicable to annuities, and to have been enrolled : however, the case having been determined on the principal point, these objections were not noticed.

security, as also the counterpart of the lease of a house let to Mr. *Cincliffe* at 48*l.* 10*s.* per annum, for the purpose of assigning that sum in payment of an annuity which I hereby engage to return so soon as that purpose is accomplished. *John Brough.*

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The father and son were thereupon enabled to obtain, and did obtain, for the use of the son a sum of 500*l.*, upon the grant of an annuity of 40*l.* to one *William Wilmshurst*.

Pending the treaty with *William Wilmshurst* for the annuity, a memorandum of agreement in writing was prepared by *John Brough* the younger, and signed by *Margaret Oddy*, which is as follows: — “By these presents be it known, that under the following considerations and with the conditions hereinafter specified, I, the undersigned, *Margaret Oddy* of *Blackheath*, in the county of *Kent*, do hereby engage and make myself responsible to Mrs. *Mary Anne Brough* of No. 42. *Lamb's Conduit Street, London*, for the yearly payment of the sum of 29*l.* 19*s.* 6*d.* of lawful money of *Great Britain*; whereas the said *Mary Anne Brough* hath yielded up to Mr. *John Brough* of *High Wycombe*, in the county of *Bucks*, for his use and benefit, certain securities, which were placed in her hands by Mr. *John Brough* the elder of No. 8. *Lancaster Street, Burton Crescent*, for securing to her the due payment of a certain sum; and whereas the said *John Brough* hath by means of those securities raised a sum of money for his benefit on annuity, for the due payment of which annuity those securities are made liable, I, the before mentioned *Margaret Oddy*, do hereby engage to pay the said *Mary Anne Brough* the sum of 29*l.* 19*s.* 6*d.* annually, by quarterly payments, in the event that the before said *John Brough* doth not duly

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pay the said annuity, and by cause of which nonpayment, those securities shall be taken for that purpose, it being understood that whereas the said *John Brough* is by virtue of his marriage with my daughter, entitled under certain circumstances and conditions to become possessed of a sum of money, part of my present estate, that should he come into possession of such money, that from and after that time this bond shall be null and void. *Blackheath, April 14th, 1823. Margaret Oddy."*

Default was several times made in payment of the annuity to *William Wilmshurst*, but the same was eventually paid by the two *John Broughs*, or one of them; default being made in payment of the quarterly portions of the annuity which became due on the 14th *October* 1826, and 14th *January* 1827, the Plaintiff, in order to prevent a sale of the premises, with her own monies paid to *William Wilmshurst* the two quarterly payments of the annuity in arrear, to the amount of 20*l.* This sum was afterwards repaid to the Plaintiff by *John Brough* the younger; but default was made in payment of the three next quarterly payments of the annuity, and the Plaintiff, in order to prevent a renewal of the threatened proceedings on the part of *William Wilmshurst*, paid the same to the amount of 30*l.*

The bill stated the preceding facts, and that *John Brough* the younger had taken the benefit of the insolvent debtors' act, and prayed a specific performance of the agreement, and a reimbursement of what the Plaintiff had already paid on account of the annuity. And that the Defendant might be decreed to give to the Plaintiff some adequate security for her reimbursement or indemnity as the Court should think fit.

The Defendant, by her answer, admitted the letter of the 7th *March* 1823, but denied that such letter was ever meant to bear the construction which had been put upon it by the complainant, or that the Defendant ever intended to guarantee any payments to be made by the complainant in respect of the annuity, other than such as she might or should be legally compelled to pay. And that such guarantee was never intended by her to be extended to payments which the Plaintiff might *voluntarily* make for or on behalf of the said *John Brough* the younger, and which she was under no legal necessity to make.

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The Defendant admitted signing the agreement, and submitted, that if she was liable upon such guarantee, the Plaintiff's remedy was at law. And denied the Plaintiff's right to have the specific performance prayed.

A witness deposed to the payment of three sums of 10*l.* each by the Plaintiff on account of the annuity, and that the sum of 22*l.* 14*s.* remained due to the Plaintiff.

Mr. *Pemberton*, and Mr. *Girdlestone*, junr., for the Plaintiff.

The Plaintiff held certain deeds as a security for the sum of 900*l.* The younger *Brough* wanted to raise money, and he and his father concurred in applying to the Plaintiff for the deeds; but she refused without some guarantee that she should be indemnified against the annuity about to be granted by the *Broughs*. And the Defendant indemnified her by a guarantee in a letter, dated 7th *March* 1823, written by the Defendant to the Plaintiff. The Defendant is the mother-in-law of Mr. *John Brough* the younger. It is confessed in the answer that the Plaintiff had given up the deeds, and it is for that act the guarantee was given. It is a necessary

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inference from the agreement that a security should be given to the Plaintiff, although the agreement is very inartificially expressed. *Parrot v. Wells and Wife (a)*, and *Ranellaugh v. Hayes (b)*, — these cases do not strictly apply, but they shew how far the Court has gone in cases of indemnity; the Plaintiff was induced to give up the deeds in consequence of this guarantee.

Mr. *Pepys* and Mr. *Wright*, for the Defendants.

The Plaintiff's remedy is in a court of law; does the Court exercise its jurisdiction simply on a contract to pay a sum of money? the court of equity never has exercised any such jurisdiction, and it is to be presumed never will; the contract is, that if the annuitant claims the annuity against the estate, then the Defendant should pay, the Plaintiff has no right to a further security.

Mr. *Pemberton* in reply.

The difficulty I have to contend with is, whether it is not a mere question at law. It is not necessary to shew that the property has been seized in execution, the Defendant being at liberty to make those payments which would protect her own property. And it is not disputed that payments have been made by her.

The MASTER of the ROLLS.

The question here is, whether the Court is under a necessity of sending the parties to a court of law. [His Honour here read the agreement.] It is said that the event has happened upon which the payment was to take place. For the purpose of considering the question, whether the Court can entertain this case, we may suppose that the event has hap-

(a) 2 Vern. 127.

(b) 1 Vern. 199.

pened. It is said that this is a case for equitable interposition, and that the Court will compel the Defendant to give a complete security. I am not aware that the Court has gone any such length, if the parties choose to satisfy themselves with a personal obligation, the Court will not give more; there is no engagement here to indemnify, but only to pay a certain sum. I am of opinion, that the Plaintiff must be left to her remedy at law, that she has no case for equitable jurisdiction, and that the bill must be dismissed, and with costs.

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BETWEEN

HENRY GODFREY, D. D., President or Master of the College of St. MARGARET and St. BERNARD, commonly called Queen's College, in the University of Cambridge, and the FELLOWS of the same College - Plaintiffs;

WESTMINSTER
HALL.
November 17.

AND

THOMAS BRIDGE LITTELL, - Defendant.

QUEEN'S COLLEGE, at Cambridge, is seised in fee of the manor of *Horsham Hall*, in the county of *Essex*.

Boundaries.
Lessor and
lessee.

Certain fields called *Lacy Fields* are parts of this manor, and the college was accustomed to demise them he is entitled to a commission or an issue. In this case a commission was directed.

Where a
Plaintiff shows
a title to some
land and a
confusion of
boundaries,

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from time to time for a term of twenty-one years, in consideration of a fine and yearly rent.

The Defendant became the tenant of those fields in or about the year 1778, under a lease granted by the college, and given to the Defendant by the Rev. *William Collier*, who was the executor of *Sarah Bridge*, an ancestor of the Defendant, and the Defendant continued tenant of the property under that lease until *Michaelmas* 1789, when the college granted him a further lease for twenty-one years, and he occupied the farm up to the time of the expiration of that term in 1810. The quantity in the leases was described as three score acres, but the college contended that the real quantity was seventy-one acres and a half, whilst the Defendant would only admit it to amount to forty-five acres, including the chaseway; and averred in his answer, that an acre, by estimation, of uninclosed lands in *Cambridgeshire* was only three roods; and from a circumstance stated by him, he concluded that the *Lacy Fields* were formerly uninclosed, and common or open field. The college also insisted, that two fields called the *Oxleys*, to the north of a chaseway, containing about twenty acres, were parts of the *Lacy Fields*, which, however, was positively denied by the Defendant, who, in 1810, only gave up to the Plaintiffs the six fields lying to the south of the chaseway, containing forty-one acres. It appeared that at the expiration of the last lease, the college claimed more land than was given up by the Defendant, and brought an ejectment, which was afterwards abandoned.

The bill charged, that by reason of the fraudulent matters mentioned in the bill, the Plaintiffs were deprived of any remedy at law in the premises, and that the college must be deprived of its just rights unless this

Court should issue a commission to ascertain the boundaries of the lands belonging to the college and to the Defendant respectively.

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The bill prayed, that the Defendant might answer and discover the matters of the bill, and that the farm called *Lacy Fields* and the boundaries thereof, might be distinguished and ascertained under the direction and decree of the Court, and that for that purpose a commission might issue. The bill also prayed for an account of rents. On the part of the Plaintiffs there was given in evidence an account or terrier, whereby *Thomas Bridge*, an ancestor of the Defendant, after noticing that the farm called *Lacy Fields* did contain by estimation sixty acres or thereabouts, certified that the farm so estimated contained by admeasurement seventy-one acres and a half.

Several witnesses were examined on both sides as to the reputation of the ownership of the land on the north side of the chaseway, some of them deposing that the whole of it was the Defendant's own property, whilst others deposed to a reputation, that one of the closes, numbered 9 on the map produced, and two acres, part of a close numbered 8, belonged to the college.

On the part of the Plaintiff, *Francis Minot*, aged seventy-seven, proved that he lived one year with the Defendant's father when thirteen years of age, and had since resided about two miles from the farm; that the *Lacy Fields* contained, as he had heard and believed, sixty acres, statute measure, and were situated in the parish of *Hendycamps*; that the chaseway passes through the *Lacy Fields*, twenty acres on the right side and forty acres on the left side, and that the property or ownership thereof was reputed to belong to *Queen's College*. His

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grandfather, who was bailiff to the college, once told him, on going over *Lacy Fields*, that the fields on both sides the chaseway were what they call *Lacy Fields*, and that deponent believed it to be true.

John Unwin proved, that part of *Lacy's Fields* was in *Hendycamps*, and part in *Steeple Bumstead*, in *Essex*, and consisted of forty acres, as he had always heard and believed; and that the *Lacy Fields* lie altogether on the left hand of the chaseway; that the piece of land numbered 9, and two acres of No. 8, which No. 8 was formerly called *Middle Oxleys* (on the north of the chaseway) were the property of *Queen's College*; but deponent never knew they were considered part of *Lacy Fields*; that No. 9 contained about eleven acres, and that fifty years ago there was no fence between No. 8 and No. 9; that the residue of No. 8, with a piece of land called *Lower Oxleys*, and other lands called the *Haverhill* belonged to the Defendant; and he recollected some timber having been felled about sixty years ago on No. 9, by a person whom he understood to be the college woodward.

Thomas Darkin, aged fifty-nine, deposed, that part of the *Lacy Fields* lay on the right hand side of the chaseway, and when he first knew the same it was in one piece of ploughed land called *Short Lands*, or *Short Ten Acres*, and contained ten acres or thereabouts. And this witness also deposed, that about twenty years since he was at work thereupon, when the Defendant, in answer to a question put to him by the witness, said, that it did belong to *Queen's College*.

On the part of the Defendant several witnesses, some of them very old, deposed, that the *Lacy Fields* all lay on the south side of the chaseway; and one of them

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deposed, that *Lacy Field* belonged to the Plaintiffs, and that he had heard *Joshua Clayton*, the woodward of the Defendant's father, say, that the *Upper Oxleys* was said to belong to the Plaintiffs. Two of the Defendant's witnesses, one of whom had been tenant to Defendant's father, and the other was the son of a tenant, also proved that timber had been cut by those tenants on the *Oxleys* by the permission of Defendant; but the Plaintiffs had cut timber on the *Lacy Fields* only. The respective sons of two other tenants of *Lacy Fields* and other lands also deposed, that the *Lacy Fields* lay on the south side of the chase-way, and contained about forty acres, and that the lands of the Plaintiffs were always reputed in the neighbourhood to lie entirely on the south side of the chase-way. It appeared, that the Defendant's father, in his lifetime, always let *Lacy Fields* with various other lands, in one holding called the *Nesterfield End Farm*. A land-surveyor proved a map he made for the Plaintiffs about thirty-five years since of the parish of *Hendychamps*. He also proved that he was present at a meeting in 1811, which was attended by the bursar and two other officers of the college, for the purpose of finally settling the matters in dispute; and when the meeting broke up, he considered the matter to be settled in favour of the Defendant. Some witnesses on the part of the Defendant proved, that an estimated acre of uninclosed land in *Cambridgeshire* was about one fourth or one fifth less than the statute measure, and this was confirmed by some of the Plaintiffs' witnesses.

Mr. *Rose*, Mr. *Tinney*, and Mr. *Loftus Lowndes*, for the Plaintiffs.

The owner of this field, called *Lacy Field*, in the reign of *Henry VIII.* admitted that it was *sixty* acres, but there is only now given up to us forty acres: we

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find the Defendant in the possession of lands immediately abutting, and ancient witnesses have proved that *Lacy Field* lay as well on one side the chaseway as on the other. This family have been in possession ever since the reign of *Henry VIII.*; and the Plaintiffs have shewn, by strong evidence, that some part of the lands on the north side does belong to the college, but there is no decisive evidence what part of the close No. 8. does belong to it; there is so much difficulty in determining what lands belong to the college, that the Plaintiffs call for the assistance of this Court.

Mr. *Bickersteth*, Mr. *Pemberton*, and Mr. *Skirrow*, for the Defendant.

The Defendant left his holding in 1810, and this bill was not filed until 1825: in 1811 this very subject was discussed; and both parties having shewn their respective papers, the matter was amicably settled between them; the officers of the college being satisfied, from the documents produced, that the college had no claim to lands on the north side. The bill charges a fraudulent retainer, but the Plaintiffs have failed in any proof of this. Then the case comes to an accidental confusion of boundaries: we say that there has been no confusion of boundaries, for that this road, the chaseway, forms the boundary between the Defendant's lands and the *Lacy Fields* belonging to the Plaintiffs; but the whole colour of the Plaintiffs' case is, that in their ancient leases the field is described as being sixty acres, and they have produced evidence of terriers that the field was seventy-one acres; but they have not proved that the estimated measure was equal to sixty statute acres: an acre by estimation in the open fields of *Cambridge* consists of three statute roods, and this property fifty years since was an open field. *Lacy Field* lies

altogether on the south side of the ancient road; the lands on the north side are called *Oxleys*, and have been so from the most ancient times, as has been proved by the witnesses: the *Oxleys* are part of the manor of *Horsham Hall*, of which this college is the lord. About thirty-five years since a map was made of several properties in the parish, and in that *Lacy Field* stands as it is now found. The college did not object to it: the college might have brought an ejectment.

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The MASTER of the ROLLS. That is the strong point of your case. How can I send a commission, when upon the Plaintiffs' own evidence some of their witnesses swear to one thing, and others swear to another? That the Plaintiffs are entitled to something, appears by the evidence of all their witnesses; I do not see anything in the way of an ejectment.

Mr. Pemberton. By a case in the second volume of *Mr. Merivale's Reports* (a), a confusion of boundaries was held not to be sufficient ground for issuing a commission.

The MASTER of the ROLLS. The difficulty is the quantity, for I believe the commission always states the number of acres which the commissioners are to set out.

Mr. Pemberton contended, that the terrier might have referred to *Lacy Field* and other lands.

Mr. Skirrow. It is submitted, that the Plaintiffs have not proved the allegations in their bill, that the Defendants has destroyed the fences, and not protected

(a) *Speer v. Crawler*, 2 *Mer.* 418.

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them. The Plaintiffs come with a very bad grace into this Court after fifteen years. The origin of this bill is on the writ *nuper obiit*. It is impossible for the Plaintiffs to sustain their bill.

The MASTER of the ROLLS. One of the witnesses swears that the Plaintiffs are entitled to two acres, part of No. 8.; another evidence is, that the Plaintiffs are entitled to ten acres north of the way; now No. 9. is not that quantity, and there must be a confusion of boundaries in No. 8.

The Court directed the case to stand over to another day, to produce precedents that issues had been directed in similar cases; and the Plaintiffs' counsel were to be at liberty to produce precedents that it was customary to issue a commission without naming the number of acres.

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Mr. Skirrow. The Plaintiffs allege that the Defendant had removed the boundaries, and that therefore they were unable to proceed at law; but in order to obtain relief in this Court they must prove themselves entitled to a certain quantity of land, which they have not done. The Plaintiffs have examined seven witnesses; first, *Francis Minot*, who proved that his grandfather told him that the fields on both sides of the chase-way were what were called the *Lacy Fields*, but evidence of reputation cannot be given as to one particular fact; the evidence of the other six witnesses is to very little effect, and is contradictory: the Plaintiffs ought to bring an ejectment. In the case of *The Bishop of Ely v. Kenrick* (a), the defendant not admitting the plaintiff's title, but denying it, the bill was dismissed; so again

(a) *Bunb.* 522. The bill was dismissed by three Barons, *contra Comyns*, who was for directing an issue.

in *Chapman v. Spencer* (a), it was decided that the plaintiff must first establish his right, before a commission could be granted, and if the right be not settled, the party will be left to his remedy at law. The Defendant has proved, that in 1810 the matter was fully entered into, and proceedings in ejectment, which had been commenced, were withdrawn. It is in evidence that the then bursar was fully satisfied, and it is therefore submitted, that this is not a case for the aid of a court of equity. By all the witnesses examined on the part of the Defendant, it has been proved that the *Lacy Fields* lie on the left hand side of the road only, and not the right; and if that be true the Plaintiffs' case must fail. The Plaintiffs on the record allege that they have a clear legal title; they have, therefore, a clear remedy at law. In all the cases in which the Court has directed issues, it has been at the request of the Defendant; whenever the Court has directed an issue, it has been "whether ninety acres, or any other and what quantity, of land belonged to the Plaintiff." The Plaintiff having first produced evidence in this Court that he was entitled to ninety acres, the case of *Hilton v. Windsor*, decided on the 20th December 1822, and not yet reported, is in point. It is submitted, upon authority and upon principle, that the Plaintiffs may now bring their ejectment, and ought to have recourse to that remedy.

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Mr. Rose and Mr. Tinney cited the cases of *The Duke of Leeds v. The Earl of Stafford* (b), *The Attorney-General v. Bowyer* (c), *Lethieullier v. Lord Castlemain* (d), *Metcalf v. Beckwith* (e), *Willis v. Parklington*. (g)

(a) 2 *Eq. Ca. Abr.* 163.

(c) 5 *Ves.* 300.

(e) 2 *P. W.* 376.

(b) 4 *Ves.* 180.

(d) 1 *Diekns.* 46.

(g) 2 *Mer.* 507.

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They also cited the following MS. cases, *Norris v. Le Neve*, 1742; *Attorney-General v. Bowyer*, 3d March 1800; *Millard v. Panconst*, decided 7th August 1794; *Robinson v. Hodgson*, decided 17th December 1800; and *Clifton v. Gwynne*, decided 12th December 1822. When the copyholder is tenant of the lord he is bound to take care of the boundaries, and the landlord is entitled in this court to have that justice which he cannot have without it. In none of the cases cited was the question of quantity discussed, but it is submitted that those cases are a sufficient authority to shew that a specific number of acres need not be set out.

Mr. Skirrow in reply.

In the cases cited, the Plaintiff's title was admitted by the Defendants; with respect to the case of *Lethieullier v. Lord Castlemain*, — it is also reported in the cases in the time of Lord King, — there the Defendants admitted the legal title; here the Defendant denies it: where the title is denied, the Plaintiff's must prove a title to a specific quantity, and then the Defendant may have a commission for partition. The cases are very well arranged in 1 *Eden*, 337., *Wake v. Conyers*. (a)

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 Dec. 7.

The MASTER of the ROLLS.

This is a bill filed for the purpose of having a commission issued to ascertain the boundaries of certain lands, which the Plaintiffs assert belong to *Queen's College, Cambridge*, but are in the possession of the Defendant. It appears that the lands in question, which are called *Lacy Fields*, have been from the time of *Henry VIII.* in lease to different persons under whom the Defendant claims. These lands are known by the

description of *Lacy Fields*, and contain by estimation about sixty acres. The last lease expired some years since, and on that occasion the Defendant delivered up to *Queen's College* forty statute acres only. The Defendant insists that a computed acre consists of three roods only, and that the lands so delivered up corresponded with the description in the lease, which stated that it contained sixty estimated acres; but it may be observed, that if the Defendant was right in stating that by the custom of the county a computed acre contained three roods only, still he ought to have delivered up, according to that computation, forty-five instead of forty acres.

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At the original hearing I was of opinion that the Plaintiffs had established a title to some lands in the possession of the Defendant, and not delivered up at the expiration of the lease, but it appeared upon the evidence that it was uncertain whether there were twelve acres not delivered up, or whether there were twenty acres, or what other quantity there might be, of which the Defendant retained the possession. There was nothing to inform me as to the quantity. I requested, therefore, that the case might stand over, and that the precedents might be searched, in order that it might be seen what course the Court had been in the habit of taking where it was convinced that there were some lands in the possession of the Defendant, but the quantity was not established: and in consequence of that adjournment many cases have been referred to, from the result of which it appears that to establish a bill of this kind, it is, in the first place, essential that the Plaintiff should make out a clear title to some lands in the possession of the Defendant; otherwise this Court will leave the Plaintiff to his remedy at law. It was argued that the Court will not interfere unless the title of the plaintiff to some

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lands in the possession of the defendant be admitted by the defendant, and certain cases were cited in which it appeared there had been an actual admission on the part of the defendant: but these cases do not prove that the Court will not act unless there be an admission by the defendant; and undoubtedly, if a clear title be established by proof in the cause, it must be a sufficient inducement to the assistance of the Court as if it had been admitted by the defendant. It would be quite absurd to say that the Court would not act upon a title established by proof, but will act only on a title established by admission; for if that were the rule of the Court, there never would have been a decree in cases of this nature, for no defendant would ever be advised to admit the title of the plaintiff; the consequence of which would be that the remedy would be wholly defeated. Of necessity, therefore, a title established by proof must be equally operative with a title established by admission. The authorities appear also to require it to be established that there is some equitable ground for its interference. And this is clearly stated in the case before Lord Northington (a), and in the case of *Speer v. Crowter* before Sir W. Grant. In this case there appears to be a clear equitable ground for the interference of the Court, namely, a confusion of boundaries, which it must be inferred was occasioned by the act of the Defendant, or those under whom he claims. The Defendant insists that the land which was comprised in the lease was bounded by a certain way called the *Chaseway*. The Plaintiffs insist that there was land on both sides of the chaseway, and that the chaseway was not the boundary between the leased lands and the other property. Now it appears that a hedge has been made on the side of the chaseway, which appears to me not

(a) *Wake v. Conyers*, 1 Eden, 531.

to be the boundary of the land of the Plaintiffs; but that hedge has been made within the last fifty or sixty years, and there is no boundary to distinguish the land on the left of the chaseway from the property of the Defendant. There is, therefore, as it seems to me, an equitable ground for the interference of this Court. As this land has been in the possession of the Defendant, and those under whom he claims, since the time of *Henry VIII.*, this confusion of boundaries must be inferred to have been the act of the lessees; it cannot have been the act of the lessors, for they were not in possession.

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Under these circumstances, therefore, the Plaintiffs have established the two principles which are essential to the jurisdiction of the Court, namely, a clear title to some land in the possession of the Defendant, and an equitable ground for the interference of the Court. Such being the case, the authorities fully justify me in stating that, although the evidence of the Plaintiffs be not uniform as to the quantity of land which they assert to be in the possession of the Defendant, the Court will still decree a commission not only to set out the land, but to enquire into the quantity of that land. The Court has discretion either to order a commission or to direct an issue, but in this case the justice, due to the Plaintiffs, will be best answered by a commission; for if an issue were directed, that issue might not determine all points in litigation. The quantity might be ascertained, but the actual local situation of the land might still remain in doubt, and a commission, therefore, might become necessary. My opinion, therefore, is, that in this case a commission must be issued to enquire and ascertain what lands of the Plaintiffs are in the possession of the Defendant, with the usual directions as to the production of deeds and the examination of witnesses.

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The following is the substance of the decree which has been passed, but had not been entered when this went to the press:—

Decree commission to enquire and ascertain what lands comprised in the indenture of lease bearing date the 25th of *February* 1790, are now in the possession or occupation of the Defendant, and to ascertain and set out the boundaries thereof; and in case the commissioners shall not be able to distinguish such lands, then they are to set out and allot other lands of equal value in the possession of the Defendant in lieu thereof, or of such part as cannot be distinguished. Deeds and papers to be produced by the parties on oath. Commissioners to be at liberty to examine witnesses on oath, and take depositions in writing.

Further directions and costs reserved until after the return of the commissioners.

NORRIS v. LE NEVE.

1742.—Reg. Lib. B. 1741. fol. 473.

*Boundaries.**Freehold and copyhold.**Commission to distinguish them.*

The bill states, that part of the premises claimed by the heirs were copyhold and belonged to them, and their title thereto was not controverted, but that Defendants insisted the copyhold lands were so intermixed with the freehold, and the boundaries so confounded, that they could not be distinguished by the Plaintiff. Whereas the Plaintiff insisted that the Defendants could distinguish them, but, if necessary, prayed a commission. The Defendants by their answer stated, that the freeholds and copyholds were intermixed, and the boundaries destroyed and could not be distinguished by them, and that in case the Plaintiff should be adjudged entitled to the freeholds, they (Defendants) were willing a commission should issue. The Court decreed that the Plaintiff was entitled to the freehold, and that the same should be distinguished and set out from the copyholds belonging to the Defendants; and that a commission should issue to distinguish the freeholds by metes and bounds.

MILLARD v. PANCONST.

By order of this date it was ordered, that a commission should issue to enquire and ascertain what freeholds belonged to the testator at his decease, situate in *Walton*, and *Wavendon Common, Berks*, and what allotment in the inclosure of the common fields of *Wavendon* had been made or allotted to *William Panconst* deceased (testator's son) in respect thereof. The Defendants prayed they might be allowed to join in the commission, which was ordered.

Reg. Lib. 1793. B. 505.

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 1794.
 Aug. 7.

*Allotments
 under an in-
 closure.*

Commission.

ROBINSON v. HODGSON.

17th *December* 1800. — Reg. Lib. B. fol. 125. — Master
 of the Rolls.

By the decree on further directions, dated 6th *February* 1797, it was referred to the Master to enquire what part of the testator's estates were customary, to which the Plaintiff became entitled as customary heir. The Plaintiff afterwards died, having previously been examined on interrogatories before the Master as to the customary premises claimed by him; and by his examination he claimed all or the greatest part of the testator's estates remaining unsold as customary. That it being apprehended a small part only was customary, but the testator's freehold and customary premises having been for a length of time in possession of the same tenant, it was, by order dated 4th *August* 1800, ordered, that in case the Master should be of opinion he could not ascertain the customary estates without a commission directed to commissioners to view and set out the same, he should be at liberty to state the same to the Court. The Master, by his report, dated 16th *December* 1800, certified that a commission was necessary; and on 17th *December* 1800, it was ordered that a commission should issue to commissioners, authorising them to view, ascertain, set out, and distinguish by metes and bounds, such parts of the customary estate of the testator to which the Plaintiff was entitled as customary heir.

*Commission to
 ascertain cus-
 tomary lands.*

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ATTORNEY GENERAL v. BOWYER.

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v.
LITTELL.

1800.
March 5.
Boundaries.
Commission.

By an order of this date, made upon the motion of the relator, it was ordered, that a commission should issue directing commissioners to set out and distinguish the lands in the county of *Suffolk* claimed by Defendant Sir *George Bowyer*, from the lands in the same county which passed by the will of the testator Sir *George Downing* dated 20th December 1817. And in case the commissioners should not be able to ascertain and set out the boundaries of the land claimed by the Defendant, they were to be at liberty to set out and allot to him other lands of equal value.

Reg. Lib. A. 1799. fol. 408.

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CLIFTON v. GWYNNE.

1822.
Dec. 12.
Boundaries of
manors.
Commission.

The Defendant, who derived his title from a grant *temp. Hen. VIII.* claimed to be entitled to the whole of the waste lands in certain parishes, as belonging to certain manors of which he was lord. The Plaintiff claimed to be entitled to a part of those waste lands, as pertaining to the manor of *Welch Penkely*, which had anciently been held with the Defendant's manors, and the Defendant himself had been steward under the crown of this manor; the Plaintiff had become owner by purchase of the crown, but was unable to ascertain to what part of such waste lands his title as lord extended; and the Defendant denied his right to any. By the decree of this date it was ordered, that a commission should issue to enquire whether the Defendant, or any person claiming under him, was in possession of any lands of right belonging, or which did at the time the Defendant became steward of the manor of right belong, to the manor of *Welch Penkely*; and that the commissioners should, as far as they were able, set forth and describe such lands "if any such there be." And in that case set out and distinguish by metes and bounds such parts, if any, of the lands belonging to that manor in the possession of the Defendant, or those claiming under him, lying intermixed with lands belonging to the Defendant's manors; and set out so much of the respective lands so intermixed, as to the commissioners should seem a fit and fair equivalent for the Plaintiff's portion thereof.

Reg. Lib. A. 1822. fol. 2071.

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KNIGHT and Another v. MARTIN.

ROLLS.

Dec. 8.

A TESTATOR had bequeathed the sum of 2000*l.* to his executor upon trust to pay the interest to his sister for life, and after her death to divide the principal sum amongst the children of his sister who should be living at the time of her decease as they should respectively attain the age of twenty-one years. There were three children, and the sister having died in 1826, the executor paid to two of them their shares: the other became bankrupt in 1821. The Plaintiffs are his assignees, and filed their bill against the executor, alleging that he had refused payment, and praying that the same with interest might be paid to the Plaintiff. The Defendant, by his answer, said he was willing to pay upon the joint receipt of the bankrupt and his assignees, and that he had been at all times willing to pay to the Plaintiffs if he could do so with safety; but that the bankrupt, who had obtained his certificate, had given him notice not to pay over the same to the Plaintiffs, and had claimed the same himself, and had threatened to institute proceedings against the Defendant to make him personally liable for the said fund. Defendant submitted whether the bankrupt was not a necessary party, and to act as the Court should direct. The Defendant had examined a witness to prove letters to him from the bankrupt, claiming the property.

Costs.

The Master of the Rolls, in a suit by the assignees of a bankrupt against a trustee of a fund contingent on the event of the bankrupt surviving his mother, which event happened after the bankruptcy, having made a decree in favour of the Plaintiff, would not make the trustee pay costs, he having acted in ignorance.

Mr. Bickersteth and Mr. Booth for the Plaintiffs.

Mr. Pemberton for the Defendant.

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The MASTER of the ROLLS made a decree for payment of the sum claimed, and he directed that the Defendant should pay the costs; but on coming into Court on the next day he sat, *Friday* the 11th of *December* 1829, his Honor, calling the attention of counsel to this case, said, that he thought he ought not to make the trustee pay costs, that trustee having acted in ignorance; but he could not give him his costs.

BENNETT v. LOW.

Costs.
Parties.

IN this case a bankrupt had been made a party Defendant in a suit after his bankruptcy. He set up a claim on his answer to a life interest under the settlement on his marriage, yet it being manifest that he had no interest, all his estate having passed to the assignee under the commission against him, and who was before the Court, the Master of the Rolls dismissed the bill as against the bankrupt with costs.

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BETWEEN

His Majesty's ATTORNEY GENERAL, at the Relation of JOHN LANGHORN and JOHN CLAY, Inhabitants and Householdors of the Parish and Borough of BERWICK-UPON-TWEED,
Informants;

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Dec. 8.

AND

The Mayor, Bailiffs, and Burgesses of the Borough of BERWICK-UPON-TWEED, and MARK JAMESON their Town Clerk, - Defendants.

BY an indenture of feoffment, dated the 28th day of *Charity.*
May 1653, between the mayor, bailiffs, and bur- *Poor rates.*
gesses of the borough of *Berwick-upon-Tweed*, of the *Costs.*
one part, and *Andrew Crispe*, alderman, of the other *The mayor,*
part, with livery of seisin indorsed, reciting that Sir *bailiffs, and*
Robert Jackson, knight, deceased, by his will bequeathed *burgesses of*
the sum of 50*l.* towards the erecting and maintaining of *Berwick-upon-*
Tweed, in
consideration
of 50*l.* left by

will for the erecting and maintaining of a house of correction there, by feoffment dated 28th *May 1653*, conveyed the moiety of a property there to the churchwardens and overseers for the erecting and maintaining of a house of correction within the borough, and for maintaining and ordering the poor therein for ever, and all other sturdy and idle persons coming and being therein, and for the getting them and every of them to work. By another feoffment of the same date, in consideration of 350*l.* owing by them to the poor, the mayor, &c. conveyed the other moiety, and some other lands, for the like purposes:

Held, that this town never having at this time raised poor rates under the statute of *Elizabeth*, these were gifts in aid of the poor rates.

As to a part of the land, the rents of which had been duly applied down to the eighteenth century, when their application ceased for the use of the poor, and was wholly carried to the corporate chest. The Court being satisfied upon the evidence it was intended to be comprised in the second feoffment, the Court declared it to be a part of the charity, and that the rents should be accounted for from 1823, when the same were claimed for the use of the poor; and the rents thereof were also declared to be applicable in aid of the poor rates.

The costs of the relators to be taxed as between party and party, and paid by the mayor, bailiffs, and burgesses. The extra costs of the relators to come out of the fund.

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a house of correction within the borough of *Berwick-upon-Tweed*. It was witnessed that in consideration thereof, they the said mayor, bailiffs, and burgesses, did grant, bargain, sell, alien, enfeoff, and confirm unto the said *Andrew Crispe*, and his assigns, all that the moiety or full half part of that water corn milne, with the appurtenances, situate and being within the bounds, liberties, and precincts of the borough of *Berwick* aforesaid, called *Graingborne Milne*, together with all grounds, lands arable and unarable, meadows, pastures, commons, hereditaments, and appurtenances to the same belonging; to hold unto the said *Andrew Crispe* and his assigns during his life, and after his decease, to such persons as Mr. Mayor and the general guild of the said town should think fit and appoint from time to time, to and for the erecting, upholding, maintaining, ordering, providing, and disposing of a house of correction within the borough of *Berwick* aforesaid, and for the better maintaining, ordering, providing for, and disposing of the poor therein for ever, and all other sturdy and idle persons coming and being therein, and for the getting of them and every of them to work.

By an indenture of feoffment, bearing date the same 28th day of *May* 1653, between the said mayor, bailiffs, and burgesses, of the one part, and *Robert Trumble* and others, churchwardens, *Thomas Dickinson* and others, overseers of the poor within the borough of *Berwick* aforesaid, of the other part, with livery of seisin. It was witnessed that in consideration of the sum of 350*l.* by them owing to the poor of the parish of the borough of *Berwick* aforesaid, they the said mayor, bailiffs, and burgesses did give, grant, bargain, sell, alien, enfeoff, and confirm unto the said *Robert Trumble*, and the other persons, parties of the other part, the other moiety or full half part of the said milne,

together with several pieces of ground situate within the bounds, liberties, and precincts, of the said borough of *Berwick*, commonly called and known by the several names of the *Clay Walls* and *Burrs*, alias *Aller Bush*, to hold to the said *Robert Trumble*, *Nicholas Lowe*, &c., and their successors, to the same uses, intents, and purposes, as are expressed in the said indenture of feoffment, of even date.

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The information stated the preceding facts, and that during many years the rents and profits of all the premises comprised in the two indentures were received by or paid over to the churchwardens and overseers for the time being of the said parish and borough, and by them applied either wholly in and towards the maintenance and employment of poor persons in a house used as and for a workhouse or house of correction, or partly for the above purposes, and partly for the use of the poor within the said borough.

That no further feoffment had been made.

That the rents had from time to time by the authority of the corporation been received by their treasurer. And as to the rents of *Grainsburn Mill*, and a close or parcel of land adjacent thereto, containing about twenty-five acres, the same had been, ever since the decease of the trustees in the indentures named, (except the interruption thereafter referred to) either received by the treasurer of the corporation, and by him, by and under the authority of the corporation, paid over to the overseers for the time being of the said borough and parish, to be by them applied pursuant to the trusts, or, under the like authority, by the permission of the treasurer had been received by the overseers of the poor from the tenants, and applied as before mentioned. And

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that in the years 1820 and 1821, the rents were under the like authority retained by the said treasurer for a very considerable time, although frequently applied for by or on the behalf of the then overseers of the poor. And on or about the 26th of *September* 1823, at a guild or meeting of the said corporation, it was resolved that the treasurer should retain the same rents for the use of the corporation; and such rents were during six months retained, and the same were afterwards paid over to the overseers, although it was alleged by the corporation that the rents ought to be employed in providing a house of correction for the keeping, correcting, and setting to work, rogues, vagabonds, sturdy beggars, and other idle and disorderly persons, within the intent of an act of parliament passed in the seventh year of King *James* the First, intituled "An act for the due execution of divers laws and statutes heretofore made against rogues, vagabonds, and sturdy beggars, and other lewd and idle persons."

That for a long series of years, and above 100 years last past, no part of the rents and profits of the said lands in the second indenture described as the several pieces of ground situate within the bounds and liberties of the borough of *Berwick*, called and known by the several names of the *Clay Walls* and *Burrs*, alias *Aller Bush*, or of any part of the said charity estate, except the said mill and the close held therewith, had been paid over to the said overseers, or applied to the purposes of the said charitable trusts, or for the use of the poor.

That the said mayor, bailiffs, and burgesses, had in part fraudulently changed the names and altered the boundaries of the said lands, and confounded or endeavoured to confound the same with other lands belonging to them in their corporate capacity; particularly

as to a close called the *Burrs*, which the bill stated to belong to the charity, and to have been comprehended in the second feoffment.

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The information asked for a discovery as well against the corporation as against *Mark Jameson* the town clerk, and prayed that it might be declared that the two indentures of the 28th of *May* 1653, were effectual conveyances at law or in equity of the lands and hereditaments therein comprised, and the fee-simple thereof upon and for the charitable trusts and purposes thereby declared, and that the said charity might be established; and that the boundaries thereof might be ascertained; and if they were confounded, lands of a competent value belonging to the corporation might be set out; and for an account.

The Defendants by their answer set forth the following order of guild, bearing date the 2d day of *May* 1653: (*i. e.*) "Ordered that there shall be security given Mr. *Crispe* to and for the use of the *poore* of this parish, by way of conveyance or rent-charge out of the *Grainsburn Milne*, for security for the 50*l.* promised by Sir *Robert Jackson* towards the erecting a house within this boro'; the further consideration whereof is referred to the next general gill." Also another memorandum or order of guild bearing date the 13th day of *May* 1653: "It is this day ordered that there shall be a conveyance made to Mr. *Crispe* during his life in trust, for the erecting a house of correction within this borough, of the moiety of *Grainsburne Milne*, in consideration of 50*l.* left by Sir *R. Jackson* for that use, and now by him paid; and that there be another made to the churchwardens and overseers of the poor of the other moiety thereof for the same use." And the defendants further said, that they found the enrolments of the two

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indentures of feoffment in the enrolment book of the corporation, and they found in the record-room the two indentures of feoffment cancelled, and that if those indentures were redeemable, they had been redeemed by monies paid by the corporation for erecting and repairing the house of correction, and for the use and benefit of the poor. They admitted the order of the 14th *November* 1821 to their treasurer to retain the rents, but they set forth another order of guild bearing date the 21st day of *February* 1822, whereby it was ordered that the rents of the *Graingburn Mill* should be paid by the treasurer to the overseers, and the treasurer paid the same accordingly; but by a subsequent order, the treasurer was directed to retain the rents, which he did for five months, when he was again ordered to pay the rents to the churchwardens and overseers.


By an order of guild, 2d *May* 1653, the security (as it is called) to be given to Mr. *Crispe* for Sir *Robert Jackson's* 50*l.*, is stated to be "to and for the use of the poor of this parish."

By the orders of guild, 28th *January* 1656, the repair of *Graingburn Miln* is said "to concern the poor, it being for their use."

By an order of 19th *May* 1676, *A. Crispe* is declared to be a feoffee "for the use of the poor." By an order, 10th *February* 1676, the rent of the milne is said to belong to the poor.

In an order 10th *November* 1682, similar expressions are used; and by an order 18th *January* 1683, "the poor" are declared to be "in great straits by reason of the nonpayment of the rents of *Graingburn Mill* to the poor;" and by an order of 17th *November* 1721, "the

beirs of the trustees" are ordered "to attend the guild to be discoursed with as to the letting of the miln for the greatest advantage of the poor."

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Documentary evidence, and the depositions of witnesses, were given in evidence with respect to the identity of the *Burrs*, which will be seen to be fully noticed in the judgment.

Mr. *Tinney* and Mr. *Rolfé* for the relators.

Mr. *Bickersteth* and Mr. *Kindersley* for the Defendants, the mayor, bailiffs, and burgesses.

The MASTER of the ROLLS. This is an information filed by the Attorney-General, at the relation of certain inhabitants of the town of *Berwick-upon-Tweed*; the Defendants are the corporation of that town. (His Honor then stated the prayer of the bill, and the two indentures of the 28th *May* 1653.) The second conveyance is stated to be a conveyance made in consideration of 350*l.* due to the poor. Now it is extremely important, first, to know what is meant by the 350*l.* due to the poor. It appears, however, by entries, that at this time the town of *Berwick-upon-Tweed* had not taken the benefit of the statute of *Elizabeth*, and had not raised rates under that statute for the relief of the poor. The poor, therefore, could have acquired property only by the donations of benevolent persons, and it must be intended that this 350*l.* due to the poor, was a sum of 350*l.* which, like the 50*l.* given to the use of the poor by Sir *Robert Jackson*, had arisen from the donations of certain benevolent persons. Now, the second conveyance, like the first, would not create the legal fee; the churchwardens and overseers not being a corporation, could not take the legal fee, because it was limited to them

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and their successors for ever; if they had been a corporation they would have taken the legal fee. So the other conveyance, which was a conveyance to *Crispe* for life, with remainder to such persons as the corporation should from time to time appoint for ever, could not confer the legal fee. A legal fee cannot be created in individuals without the use of the word "*heirs*," or some expression which is equivalent to the effect of the term "*heirs*." With respect to charitable trusts, the Court does not adhere to form; the Court always looks at the intention, and the intention here was plainly to constitute a charity which was to endure for ever. It appears by one memorandum only in the guild books, that it is stated that these conveyances were a security to the poor; and it has been said at the bar, that the security to the poor must mean a redeemable security, and, therefore, that the corporation might resume these lands at any time by shewing that the consideration in respect of which the conveyances were made by way of security, had been satisfied to the use of the poor. Now I do not apprehend that security to the poor has at all the meaning which is contended for here, because it was in truth a security to the poor if it were meant to be a perpetual conveyance, for it secured to the poor the revenues of those lands, in the place of leaving the monies given to the use of the poor in the coffers of the corporation, which might be dissipated and lost; and in that sense it appears to me the term "security" is used in that memorandum. I am of opinion, therefore, that this Court must decree that the trusts of these two conveyances are to be established as trusts for charitable purposes. The next question is as to what charitable purposes are those trusts to be established. Generally speaking, gifts for the use of the poor are not gifts in aid of the poor-rates; because it has been said, in other cases, that gifts in aid of the poor-rates would be gifts

for the benefit of the rich and not for the poor; but in this particular case, this town not having taken the benefit of the statute of *Elizabeth*, and never at this time having raised poor-rates, these were gifts for purposes in respect of which poor-rates were to be levied under that statute; these gifts, therefore, were a substitution for poor-rates; poor-rates having been adopted in that town in the year 1729, the declaration of the Court must be, that these were gifts in aid of the poor-rates. It appears so far from the corporation considering these conveyances merely to amount to redeemable securities, that they have continued to apply the revenues of the lands which they insisted were comprised alone in these two conveyances in aid of the poor-rates, down to the present time. The lands of which they have thus applied the revenues consist of twenty-five acres; and the question is, Whether those twenty-five acres are or are not the whole lands comprised in those two conveyances? For the corporation it is said, that those twenty-five acres comprise all the lands, and they reason thus: the lands comprised in the two conveyances are *Graingburn Mill*, with the lands belonging to it, *Clay Wall Lands*, and the lands called the *Burrs*, or *Aller Bush*. That it appears by a certain entry in the guild books in the year 1620, that the *Graingburn Mill* was at that time erected by the corporation, and that there was then annexed to it three acres of land only; that it appears on the evidence that the *Clay Wall Lands* consisted of five acres only, making together with the three acres of land of the *Graingburn Mill*, eight acres; and the revenues of twenty-five acres having been constantly applied to the use of the charity, that it must be intended that the seventeen acres to make up the twenty-five, were the lands described under the term *Burrs*, alias *Aller Bush*. Now this would be a most reasonable conjecture provided there was no evidence in the cause; but


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there is evidence on both sides, and the evidence on both sides must be opposed in order to determine on which side the weight of evidence applies. [His Honor here went into a very elaborate and critical review of the evidence, in the course of which he shewed instances of the application of the rent of the *Burrs* down nearly to the eighteenth century, when the application of any part of these rents of the *Burrs* ceased for the use of the poor and was wholly carried to the corporate chest, and that when the corporation afterwards applied a part of the rent which they received for the *Burr Lands* to their own use and for the benefit of the corporation chest, it was to be considered as a gradual usurpation, which at last terminated in the application of the whole of those revenues to that purpose.] Under these circumstances, therefore, I must infer that the lands called the *Burrs* were not included in the twenty-five acres, but that between the year 1620 when the *Graingburn Mill* was erected, and the year 1653, when these conveyances were made, there had been by the acts of the corporation considerable additions made to the quantity of land which was originally annexed to the *Graingburn Mill*; and that the land called the *Burrs*, therefore, which is stated to be about nine or ten acres in quantity, and the description of which is perfectly known, and is now in the occupation of a person of the name of *Laing*, was land meant to be comprised in the second feoffment, in addition to the *Clay Wall Lands*. The amount of the consideration which is there stated to have been 350*l.*, was a sum at that time of very considerable value compared to the present nominal value of that sum.

Upon the whole, therefore, I must declare that the *Graingburn Mill*, with the twenty-five acres of land, together with the land called the *Burrs*, now let to *Laing*,

were by the indentures of the 28th of *May* 1659, devoted for ever to the erecting and upholding a house for the reception of the poor of the said town, and for the maintenance of the poor therein ; and that the same, being purposes which were by law to be provided for out of the poor-rates, the rents of the said mill and lands are applicable in aid of the poor-rates, and are to be paid by the Defendants to the churchwardens and overseers of the poor accordingly ; and I must refer it to the Master to take an account of the rents which have accrued due from the said lands called the *Burrs* since the year 1823, when the same was claimed for the use of the poor ; and I must also refer it to the Master to tax the costs of the relators up to the hearing, and direct that the same shall be paid by the Defendants, and reserve further directions and subsequent costs.

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The costs to be taxed costs as against the Defendants, and the relators to be paid their extra costs out of the funds.

The Master to ascertain what lands occupied by *Laing* consist of the *Burrs*, and to apportion the rents.

There was a question as to the costs of the town clerk, who had been made a party to the bill for the purpose of discovery. Ordinarily the Plaintiff pays the costs of a bill of discovery ; in this case the officer of the corporation was made a Defendant for the purpose of discovery, and the Court seemed to think that the corporation must pay his costs, and the Master of the Rolls directed that an inquiry should be made as to the practice, and whether, if the relators in this case are to pay the town clerk's costs, the corporation must repay them to the relators. The precedents were to be searched.

The question of costs has not yet been decided.

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Others.*Mines.**Partnership.**Debts of a
bankrupt
partner to
the co-part-
nership.**Annuity for
years.*

Mines are, for many purposes, partnership property. They are liable to the debts of the partnership and debts to the co-partnership; and notwithstanding the bankruptcy of a partner indebted to the co-partnership, the accounts are to be taken beyond the time of the bankruptcy, and up to the time of the sale; the debts of the partnership are first to be satisfied, and out of the bankrupt's

share repayment is to be made to the co-partnership of what is due to it from him. Annuity for years originating in an agreement for a loan, and producing more than a return of the principal and five per cent. interest, is usurious.

BY indenture of lease, dated the 24th of June 1799, George Birch, Esq. and Thomas Lane, clerk, granted and demised unto Thomas Smith, Samuel Fereday, William Turton, Charles Norton, Thomas Jones, and William Underhill, all the mines and strata of coal under certain messuages and lands at Tipton, in Staffordshire, for the term of 120 years, at the annual rent of 300*l.* an acre; and by an indenture of the same date, a lease was granted of the messuages and lands to the same lessees, except Underhill, for the like term of 120 years. By a deed, dated 5th August 1800, the shares of each in the colliery were declared to consist in the whole of 200 shares, of which twenty-nine belonged to Underhill, and twenty-eight to Turton. By indenture bearing date the 19th May 1802, in consideration of 6500*l.*, Underhill assigned his twenty-nine shares to his copartners, and the consideration-money was paid out of the partnership fund. Various changes took place in the ownership of the shares, and Samuel Wagstaff became entitled to twenty-eight of them. Turton, who had the management of the partnership, became considerably indebted to it, and deposited with the Plaintiffs some promissory notes as a part security. On the 2d March 1822, a commission of bankrupt was issued against Turton, and on the 20th January 1823, a commission was issued against Wagstaff. On the 4th March 1822, Turton being then a bankrupt, the other parties signed a dis-

solution, which was advertised in the *London Gazette*. The bill stated the preceding facts, and that the copartners had a lien upon the twenty-eight shares of *Turton* for the balance due from him to the copartnership, and charged that on the 28th *February* 1822, a notice was served upon the copartnership that by a certain indenture bearing date the 18th day of *January* 1813, *William Turton* assigned eight shares in the colliery and premises to *Benjamin Higgs*, for securing 3000*l.* and lawful interest. On the 2d *March* 1822, a notice was served upon the copartnership, that by an indenture bearing date the 26th *February* 1814, *Turton* assigned to *Thomas Devey Wightwick*, a Defendant, twenty shares as a security for certain sums of money. And the Plaintiffs charged that such notices conveyed to them the first knowledge they had of the assignments therein respectively mentioned. And Plaintiffs charged that those mortgages or securities were usurious and void. And, as evidence thereof, the Plaintiffs charged, that by the indenture of the 26th *February* 1814, *William Turton*, in consideration of 4000*l.* therein stated to be paid to him by *Thomas Devey Wightwick*, granted to him (*Wightwick*) an annuity of 731*l.* 8*s.*, payable half-yearly, for an absolute term of *eleven years and six months*, and he assigned the aforesaid twenty shares in the colliery as a security for such annuity. And the Plaintiffs further charged that the same annuity paid half-yearly for eleven years and six months was more than sufficient to secure and pay at the end of that period the principal sum of 4000*l.*, with interest for the same in the meantime, at the rate of 15*l.* for every 100*l.* thereof by the year, without any loss or risk whatever either of capital or interest. And the Plaintiff further charged that such annuity paid half-yearly for *six years and six months* was more than sufficient to secure or pay at the end of that period the principal sum of 4000*l.*, with interest for the same at the rate of 5*l.* for every 100*l.* thereof by the

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year. And the Plaintiffs further charged that at the time when the Defendant *Wightwick* advanced the 4000*l.* to *Turton*, the real agreement between them was, that *Turton* should secure to *Wightwick* an annuity of 664*l.* 18*s.*, free from the property tax, for the term of eleven years and six months; and pursuant to such agreement, *Turton* immediately before the execution of the alleged deed, made and signed twenty-three several promissory notes for 332*l.* 9*s.* each, being one moiety of the 664*l.* 18*s.*, payable, the one on the 26th day of *August* then next ensuing, and the others successively on the several days during the said period of eleven years and six months on which the several half-yearly payments of the annuity were to be made payable; and that *Turton* deposited the notes with *Wightwick* by way of further securing the alleged annuity. And it was agreed between them that on each of the half-yearly days of payment of the annuity, *Turton* should take up one of the notes in discharge of the then accruing half-yearly payment of the annuity. And the Plaintiffs further charged, that it was at the same time agreed between *Turton* and *Wightwick* that a sum of 66*l.* 10*s.*, being one tenth part of the 664*l.* 18*s.*, or thereabouts, should be added to the 664*l.* 18*s.*, and that the sum of 731*l.* 8*s.*, being the amount of the two sums added together, should be the amount of the alleged annuity so to be granted and secured. Further charged, that the 66*l.* 10*s.* was added to meet the property tax on the annuity. Further charged, that fourteen of the notes or bills had been duly taken up and paid by *Turton* previously to his bankruptcy, and that the remaining nine still remained in the possession, custody, or power of *Wightwick*. Further charged, that at the respective times of the loans or advances by *Turton* to *Higgs*, it was agreed that *Turton* should pay to *Higgs* interest at the rate of 10 per cent., and that interest was paid at that rate. Further charged, that *Higgs* entered, and

had in his books of account, a debtor and creditor account between himself and *Turton*, in which he regularly took credit on the several quarterly days of payment from *Lady-day* 1809 to *Midsummer* 1815 inclusive, for one quarter's interest, after the rate of 10 per cent. Further charged, that no notice was ever given by *Higgs* to the company that the interest on the alleged mortgage debt, or any part thereof, was in any manner in arrear or unpaid. Further charged, that neither *Wightwick* nor *Higgs* gave notice to the firm that they desired to be considered as partners in respect of the assignments or otherwise, or that the firm was not to consider *Turton* as a partner; but, on the contrary, *Wightwick* and *Higgs* permitted and suffered *Turton* to appear and act, and the Plaintiffs fully believed him to be the owner of the twenty-eight shares to all intents and purposes.

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And the bill prayed that it might be declared that the copartnership was dissolved on the 2d day of *March* 1822, and that the said copartnership might be declared to have a lien upon the twenty-eight shares of *Turton* for payment of what was due from him to the copartnership.

Defendant *Wightwick*, by his answer, set forth his annuity-deed, whereby, for 4000*l.*, an annuity of 73*l.* 8*s.* was granted to him, and insisted upon its priority to any balance which should be found to be due from *Turner* to the copartnership. He said, that the assignment to him was known to several of the copartners, and denied that the notice of the 2d *March* 1822 was the first notice that the copartnership had of the assignment to him, and the Defendant said that he had paid a valuable consideration for the annuity, to wit, 4000*l.* This Defendant further admitted that *Turton* did, on the 26th *February* 1814, make and sign three several promissory

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notes for 332*l.* 9*s.* each; and that the sum for which such notes were respectively signed, was one moiety of the said annuity of 664*l.* 18*s.* : admitted the payment of the annuity for seven years up to 26th *February* 1821, but said that he never contracted to lend *Turton* 4000*l.* or any other sum.

Defendant *Higgs*, by his answer, insisted upon the priority of the indenture of assignment of the 18th *January* 1818, and claimed it in priority to any balance claimed by the copartnership, and admitted it was understood that *Turton* should pay him 10*l.* for every 100*l.* by the year, and that this Defendant regularly took credit in his books for interest at that rate. Amongst the depositions on the part of the Plaintiffs was that of an accountant, that he had made a calculation of the value of an annuity of 731*l.* 8*s.*, payable half yearly for the absolute term of eleven years and six months, and according to that calculation, he found that such an annuity so payable would be sufficient to pay within that period the sum of 4000*l.* with interest thereon at the rate of 14 per cent. per annum, and that the like annuity of 731*l.* 8*s.* payable half yearly, would be sufficient to pay in six years and six months the sum of 4000*l.* and interest at 5 per cent. per annum. And he also found that an annuity of 664*l.* 18*s.* payable half yearly for an absolute term of eleven years and six months without any deduction, would be sufficient to pay in that period the sum of 4000*l.* and interest, at the rate of 12*l.* 10*s.* per cent. per annum. There were other depositions to the same effect, one of which stated, that the interest produced would be 12 per cent., and the time for repayment at 5 per cent. seven years and a quarter. There were also depositions of the debt due from *Turton* to the company. On the part of the Defendant *Wightwick* there was the evidence of the bankrupt, that

three of the shareholders knew of the annuity granted to him. In the cross-examination he proved, that the real understanding between him and *Wightwick* was, that he should advance him 4000*l.*, and that in some manner the same should be secured to him with interest exceeding 5 per cent. And he also proved the charges in the bill with respect to the notes.

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Mr. Bickersteth and *Mr. Rolfe* for the Plaintiffs.

Mr. Bickersteth. It appears that in *July* 1813 *Higgs* had made advances amounting to 3000*l.* to *Turton*, upon an agreement that he should receive 10 per cent., and *Higgs* in answer admits this, and that he had credit for it in his account with *Turton*. *Higgs* took an assignment of eight of *Turton's* shares in the colliery in the shape of a mortgage, purporting to secure the sum of 3000*l.* with lawful interest: yet after the execution of that deed, as well as before, he received 10 per cent. interest.

With regard to the case of *Wightwick*, he had at different times advanced 4000*l.* to *Turton*; the transaction on the face of it is a purchase of an annuity of 731*l.* 18*s.*, payable for eleven years and six months for 4000*l.* We find that in the course of eleven years and a half, he would have received back his principal with interest at 12 per cent.; in seven years and a quarter, he would have received his principal with interest at 5 per cent. *Wightwick* has actually received these payments for seven years; this is an usurious transaction, and a contrivance to get back the principal money with interest at 12 per cent. Now I am not prepared to say in all cases that a purchase of an annual sum would be usurious; but in this case there is no hazard. At the time of the bankruptcy of *Turton*, he was indebted to

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the partnership in the sum of 10,000*l.* and upwards, and no person can take any thing from *Turton's* interest until the partnership claim is satisfied: those who stand in the place of the partner, cannot be better situated than the partner himself had he not become bankrupt. The affairs of a colliery has from the time of Lord *Hardwicke* been considered as a trading partnership, *Crawshay v. Maule* (a): as against the assignees of *Turton*, the other partners are entitled to a lien on his shares for the purpose of satisfying the claims of the partnership upon his estate. I cannot dispute that those who represent *Turton* are entitled to a share of the subsequent profits of the co-partnership, the property of the bankrupt having been employed in it. (b)

Mr. Rolfe. The question is, Have the assignees of *Turton*, or the Defendants *Higgs* and *Wightwick*, any claim upon the mines, except as to what shall remain after the demands of the co-partnership are satisfied? In *Crawshay v. Maule*, Lord *Eldon* held that the leases constituted a part of the partnership effects. Now there were only in that case two individuals in the partnership, and if there could have been a case in which each partner might have disposed of his share that was the case; but Lord *Eldon* said that it had been repeatedly decided, that interests in lands purchased for the purpose of carrying on trade are no more than stock in trade, and, as a part of the stock, might be sold. In *Jefferys v. Smith* (c), Lord *Eldon*, referring to a case before Lord *Hardwicke*, said that a colliery was

(a) 1 *Swanst.* 495.

(b) *Crawshay v. Collins*, 15 *Ves.* 218. *Waters v. Taylor*, 15 *Ves.* 10. *Forman v. Homfrey*, 2 *Ves. & Bea.* 329. *Featherstonhaugh v. Fenwick*, 17 *Ves.* 298.

(c) 1 *Jac. & Walk.* 298.

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to be considered in the nature of a trade (a), and where persons had different interests in it, it was to be regarded as a partnership; and where persons were concerned in such an interest in lands as a mining concern, the Court would appoint a receiver although they were tenants in common of it. Now in the case before the Court, the parties held under leases, and the part afterwards purchased was paid for out of the funds of the partnership. Now do not the twenty-nine shares so purchased, form part of the partnership? The mine being worked under a common firm by the direction of a manager, and carrying every appearance of a partnership. The Plaintiffs have a lien against the assignees, and against the persons claiming under the deeds of *Turton*. Neither *Wightwick* nor *Higgs* can establish any claim under the deeds of *Turton*, which are usurious; for Defendant *Higgs* in his answer admits that the security was for the money at 10 per cent. If that be not usury, it would be impossible to say what is usury. With respect to *Wightwick*, it will be contended that an annuity for years certain does not constitute usury, but the authorities refer only to rent charges, and those, if not colourable, would be good if they were not in reality interest of money. This is an annuity secured by an express covenant of the grantor, that half yearly the party should receive a sum which in the end would exceed the principal and interest at 5 per cent. Could a man for 100*l.* grant an annuity of 110*l.* for one year? Could that be supported — or an annuity of the like sum for two years in consideration of 200*l.*? In the case of the Defendant *Higgs*, there is a clear admission; and with respect to *Wightwick*, if there be not a case against him, certainly the laws against usury are not so strong as they have been thought to be.

(a) *Story v. Ld. Windsor*, 3 Atk. 650. *Sayer v. Pierce*, 1 Ves. 232.

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Mr. *Lovat*, for the executor of a deceased partner, and in the same interest with the Plaintiff. In *Doe v. Gooch* (a), where the Court having found that it was a usurious loan, refused to disturb the verdict on a motion for a new trial; upon which Justice *Bayley* said, the annuity is at hazard if for life; but where it is in the nature of an annuity for years, there is no case in which such an annuity has been held not to be usurious, where upon calculation it appeared that more than the principal, together with legal interest, was to be received.

Mr. *Tinney* for the assignees of *Turton*. If Mr. *Turton* at the time of his bankruptcy had drawn out 10,000*l.*, I admit that in the account up to that time the partnership may take credit; but subsequent profits cannot be placed to that credit. There is an old case of *Story v. Lord Windsor* (b), wherein Lord *Hardwicke* said, a colliery is a kind of trade, and therefore an account might be taken of the profits in this Court; but a debt of one partner upon another cannot affect his share. If the Court should be of opinion that this was a copartnership, the copartners would only be entitled up to the time of the bankruptcy.

(His Honor dissented from this, and was of opinion that the accounts must be taken up to the time of the sale.)

Mr. *Pemberton* and Mr. *Wilson* for the Defendant *Wightwick*. The securities to *Wightwick* cannot be impeached at the instance of the present Plaintiffs unless they first establish that they have some interest in the shares of *Turton*. But they have shewn no such interest. *Turton* and the rest of the owners of these mines were mere tenants in common. It was not a trading partner-

(a) 5 B. & A. 666.

(b) 2 Atk. 630.

ship, nor can the doctrine of lien, which exists as between partners in a trade, be applied to an interest of this nature. It was a tenancy in common in lands and in taking the produce of them. That produce underwent no alteration, but was brought to market in the same condition in which it was obtained from the mines. In this respect the present case differs entirely from the case of *Crawshay v. Maule*, which is cited for the Plaintiffs. The property there was iron-works, in the carrying on of which not only the iron ore obtained from the mines was made use of, but there was evidence that the partners, in the course of their trade, purchased large quantities of iron from other persons, and that the ore obtained from their own mines and the iron thus purchased were manufactured by them and taken to market, and sold in a manufactured state. That was clearly a trading partnership. Here, however, the subject is coals, which are merely taken from the mine and sold, without undergoing any change whatever. The parties merely took the natural produce of the land, and it does not differ from the ordinary case of tenants in common of lands, where one of the tenants in common has received more than his share of the rents and profits: in which case his companions have a personal remedy against him, but have no lien on his share. The evidence discloses another ground on which a court of equity ought to refuse relief to these Plaintiffs. It appears that they were apprized of the treaty with *Wightwick*; that the negotiation with him was conducted by one of them; and that the money advanced by *Wightwick* was received by some of them in satisfaction of a debt previously owing to them by *Turton*.

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Supposing, however, the opinion of the Court to be against the Defendant *Wightwick* on both these points, it is submitted that no case has established the pro-

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position that this transaction is usurious; but, on the contrary, there are many cases to shew that it is not so. Usury is an offence created entirely by statute, and nothing can be usurious except what the statutes have expressly declared to be so. The present law on the subject of usury is the statute 12 *Ann. c. 16.*, which provides, "that no person shall for loan of any monies, wares, merchandise, or other commodities whatsoever, receive above the value of 5*l.* for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever made after the time aforesaid for payment of any principal or money to be lent or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the hundred as aforesaid, shall be utterly void."

It is obvious, therefore, that where there is no loan, or no forbearance, there can be no usury; and in conformity with this rule, it has been repeatedly decided that where the transaction is really for a sale of an annuity, though for a term certain, if there was neither a loan nor a communication for a loan, the grant is not usurious, though, in the event, the party may receive a larger sum than the legal rate of interest would have amounted to. And they referred to *Finch's case* (a), *Fuller's case* (b), *Burton's case* (c), *Rowe v. Bellasis* (d), in which last case on the loan of 100*l.* it was agreed that for the forbearance the borrower should pay 120*l.* as follows; viz. 40*l.* on the 20th *January* and 20th *July*, by equal portions annually, next after *July* then instant, which exceeded the then legal interest of 6 per cent.;

(a) *And. 121. pl. 169.*(c) 5 *Co. 69.*(b) 4 *Leon. 208. pl. 554.*(d) *Sid. 182.*

and for further security a bond was given and judgment confessed for 200*l*. *Twisden J.* held that the contract was not usurious, but was a purchase of an annuity for three years. They also referred to the opinion of *Burnet J.* in *Lord Chesterfield v. Janssen (a)*, and that of *De Grey C.J.* in *Murray v. Harding. (b)* The observation of *Bayley J.*, cited on the other side from *Doe v. Gooch*, was evidently made by that learned Judge when his attention had not been called to the existing authorities on the subject, and cannot be considered as an expression of his opinion on the point.

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The MASTER of the ROLLS.

In the year 1799, a lease was taken of certain mines, and a lease was also taken of the surface; the mines and surface were used with a community of expense and profit. A mining concern is to some purposes a trading concern; it is not so to all purposes; it has not therefore all the incidents of a trading concern. It is a principle that all property, whether real or personal, is subject to a sale on a dissolution of the partnership. This is a property acquired by the partnership for the purposes of the concern, and it is subject to all the debts of the partnership property, and to the debts of one partner to the other partners in respect of the partnership.

Then as to the loans, are they or are they not usurious? The persons who advanced them have obtained the legal interest. The first person who claims is *Higgs*, who at different times advanced 3000*l*.; and it was agreed that he should receive 10 per cent., and he actually did receive 10 per cent. up to the time of the execution of the mortgage security to him. Subsequently a mortgage is made to

(a) 2 *Ves.* 142.

(b) 2 *Bl. Rep.* 859. 3 *Wils.* 390. S. C.

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him to secure that sum with interest at 5 per cent. ; but it appears by the evidence that he continued to receive 10 per cent. It is impossible to raise a question upon it. This is clearly usurious. The other Defendant's claim it has been endeavoured to support by serious argument. He purchased an annuity of 664*l.* 10*s.*, and the property tax is added ; this was purchased by him for a term of eleven years and a half, and there is a covenant in the deed to pay the same by half yearly payments. The transaction was accompanied by notes, which were respectively to the amount of a half year's annuity. It is mere colour that this is the purchase of an annuity. Several old cases have been referred to, which, however, I do not think it necessary to consider. What in substance is this transaction ? Is it not in effect a loan ? These promissory notes are for payment by instalments. This transaction is substantially a loan of money to be repaid by instalments exceeding the principal, and 5 per cent. interest.

It is in my opinion usurious.

His Honor then made the necessary declarations.

By the minutes of the decree, it is referred to the Master to enquire and certify who were at the time of the bankruptcy of the Defendant *William Turton*, and who have from time to time since been, and who now are the persons entitled to and interested in the partnership concern in the pleadings mentioned, and in what shares and proportions they were and are respectively so entitled and interested. And declare that the two several leases of the mines and minerals, and of the surface of the land under which the same are situate in the pleadings mentioned, both dated the 24th *June* 1799, and the property comprised therein constitute part

of the property of the partnership; and let *the twenty-eight shares, late of the Defendant William Turton*, in (a) all and singular the partnership property and effects be sold, with the approbation of the Master, to the best purchasers that can be got for the same, to be allowed of by the Master, wherein all proper parties are to join as the Master shall direct; and let the money arising from the sale be paid into the Bank, with the privity of the Accountant General of this Court, to the credit of this cause, subject to the further order of the Court; and refer it to the Master to take an account of the dealings and transactions of the partnership from the last settled account before the bankruptcy of the Defendant *William Turton*, up to the time of the sale hereinbefore directed, not disturbing any settled account; and let the Master enquire and state what debts are due and owing from the partnership, and let such debts be in the first place satisfied out of the proceeds of the sale, but without prejudice to any question between any of the parties; and declare that the Plaintiffs are entitled to be repaid out of what shall appear on taking the accounts to be coming to the Defendants, the assignees of the Defendant *William Turton*, in respect of his twenty-eight shares of the said concern, whatsoever sum shall be found to be due to the said concern from the Defendant *William Turton*, or his assignees, at the time of the aforesaid sale; and declare that the indentures of the 18th *January* 1813 and the 26th *February* 1814, are respectively usurious and void, and let the same be given up to be cancelled. The Master to be at liberty to state any special circumstances. Further directions and costs reserved.

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(a) The words in *italics* have been added by arrangement between the parties.

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ROLLS.
Dec. 15.

F. W. HULKES and Others, Infants, by their next
Friend, - - - - Plaintiffs;

AND

BARROW and Others - - Defendants.

*Tenant for
life.*

*Liability to
renew.*

Bankrupt.

Costs.

T. H., by his will, devised certain freehold and leasehold property to a trustee, upon trust, to permit his son, *T. E. H.*, to receive the rents during his life, subject to the payment of rents and performance of the covenants reserved and contained by and in the present or future leases, whereby the leasehold premises were or should be held; and also all taxes, fines, and expenses attending the same; remainder upon trust for the sons of *T. E. H.* in fee, as tenants in common. The tenant for life became bankrupt, and afterwards died. His assignees received a sum of 2000*l.* subsequent to the bankruptcy for rents: Held, that these rents were liable to the fines for renewal.

THOMAS HULKES, Esq., deceased, being possessed of considerable real estate, and certain renewable leases held of the dean and chapter of *Rochester*, by his will, dated the 22d day of *August* 1805, gave and devised unto *Francis Barrow* his dwelling-house, warehouses, corn windmill, and other hereditaments, freehold and leasehold, in *Stroud*, and *St. Margaret*, next the city of *Rochester*, upon trust that he, the said *Francis Barrow*, his heirs, executors, or administrators, should from and after his decease from time to time permit and suffer his younger son *Thomas Edward Hulkes*, the late father of the Plaintiffs, to receive and take the rents and annual profits of all his said freehold and leasehold messuages, tenements, lands, grounds, hereditaments, and premises, as and when the same should respectively accrue and become due and payable for and during the term of his natural life, for his own use and benefit, subject to the payment of the rents and performance of the covenants and agreements reserved and contained or to be reserved and contained in and by the present or future leases, whereby such leasehold premises were or should be held; and also all taxes, fines, and expenses attending the same premises; and from

and immediately after the decease of his said son *T. E. Hulkes*, subject as aforesaid, it was his will that the said *Francis Barrow*, his heirs, executors, and administrators, should stand seised and possessed of the said freehold and leasehold messuages, tenements, hereditaments, estates and premises last thereinbefore mentioned to be thereby devised and bequeathed to him, upon trust for all and every the son and sons of his said son *Thomas Edward Hulkes*, lawfully begotten or to be begotten, if more than one, as tenants in common, and not as joint tenants, and the heirs of their respective bodies lawfully issuing.

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The testator died ; and *Thomas Edward Hulkes*, having entered into business, had become indebted to *D. H. Day* and Co., his bankers, in the sum of 10,000*l.* and upwards, and by indenture bearing date the 7th day of *December* 1820, he conveyed and assigned all his life-interest in the said several estates and premises by the will of the testator devised and bequeathed to him for life respectively to *David Hermitage Day*, one of the firm of *D. H. Day* and Co., with power to receive the rents and profits of the said estates, and apply the same in the payment and discharge of the said alleged debt of 10,000*l.* and interest, in manner therein mentioned, subject to the payment of the rent and the performance of the covenants ; and it was agreed that *D. H. Day* might, by and out of the monies which should come to his hands, pay or discharge all sum and sums of money payable for rents, the expenses of performing the covenants in the leases under which the same were or might be held, the expenses of repairing, or for or on account of any taxes, charges, rates, *fines*, or other outgoings.

D. H. Day thereupon entered into possession, and received the rents.

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HULKES

v.

BARROW.

On the 9th day of *May* 1821 a commission of bankrupt was issued against *Thomas Edward Hulkes*, under which he was found and declared bankrupt. *T. E. Hulkes* died on the 30th day of *January* 1824, leaving the infant Plaintiffs, his only children, him surviving, who thereupon became entitled to the said freehold and leasehold premises.

The bill stated the preceding facts, and, after praying that the testator's will might be established, and the trusts thereof executed, prayed that the said *D. H. Day* might be decreed, out of the rents and profits of the said premises received by him, to pay and satisfy all fines and fees and expenses necessary for the renewal of any lease neglected to have been renewed during the time of his possession of the said premises, or his receipt of the rents and profits thereof, or such proportion of the said fines, fees, and expenses, as in the judgment of this honourable Court ought to be paid in respect of the life estate or interest of the said *Thomas Edward Hulkes* in the said premises.

A supplemental bill was afterwards filed, stating that an action had been commenced against the said *David Hermitage Day* by the assignees of the bankrupt, and that, by a verdict in favour of the assignees, the instrument under which *D. H. Day* received the rents and profits of the estates was found to be void, being taken by the Defendant *Day* with the knowledge of *T. E. Hulkes's* insolvency, and that *D. H. Day* had alleged that he had paid over all the money he had received to the assignees.

This supplemental bill charged that *D. H. Day* had not acted correctly, and was still answerable to the Plaintiffs, inasmuch as he ought from time to time, as

necessity required, to have renewed the leases, and done the repairs; and that the assignees could only have recovered from him the surplus.

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D. H. Day, by his answer, stated that he had paid over the rents amounting to 2009*l.* 14*s.* 8*d.*, besides costs to the assignees, and that since the verdict he had received 50*l.* on account of the rent.

Mr. Bickersteth and *Mr. Beames* for the Plaintiffs.

The question for the consideration of the Court is, whether the Plaintiffs, who under the will of *Thomas Hulkes* are by the death of their father become entitled to this property, can call on those who have received the rents to pay the fines for the renewal of the leases. It is immaterial whether there be in the leases any covenant by the lessors to renew the interests of the lessees; it is sufficient that there has been a habit of renewal, and the tenant for life and those claiming under him are not entitled to any thing until the payment of the fines. *Mr. Day*, having received the rents, is liable, notwithstanding the action and verdict against him, for the fines for renewal.

Mr. Pemberton for *D. H. Day*. All the money has been received from *Mr. Day* by the assignees of the tenant for life, except about fifty pounds, which he has since received. The decree against him will be to deliver up the deeds in his possession to the Plaintiffs, and to bring into Court the sum of 50*l.*; the bill should then be dismissed as against him.

Mr. Barber for the assignees was instructed to resist the bill altogether. Why are the Plaintiffs to have a preference for the sum of 2009*l.* over the other creditors

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of the bankrupt? at most it is but a debt, and the Plaintiffs cannot have a specific lien on that sum.

The MASTER of the ROLLS was of opinion that after the action at law, Mr. *Day* was not answerable for the fines for renewal. Declare that Defendant *Day* pay the 50*l.*, into Court, and bring in the deeds; the bill to be then dismissed as against him. Declare that the rents received by the assignees from *Day*, are to be considered as received subsequent to the bankruptcy, and, as such, liable to the fines and expenses of renewal.

The assignees are liable to the amount received from the Defendant *Day*, after deducting the expenses of recovering it beyond the taxed costs. The bankrupt's estate is entitled to costs, charges, and expenses.

Enquire what now would be the fine to be paid to the lessors, the dean and chapter of *Rochester*, in order to place the Plaintiffs in the same situation as they would have been if the lease had been renewed according to the habit of renewing of the dean and chapter.

Enquire what are the costs, charges, and expenses of the assignees in recovering from the Defendant *Day* the sum of 2009*l.*, that being the fund liable to pay the fines for renewal.

Reg. Lib. A. 1829. fol. 417.

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ANN NICHOLAS, Widow, and Others, Plaintiffs;

AND

EDWARD NICHOLAS and T. F. LEWIS,

Defendants.

ROLLS.

Dec. 2.

ROBERT NICHOLAS, Esq., by his will, bearing date the 20th *May* 1818, devised all his real estate to *Thomas Frankland Lewis*, Esq. and his heirs, to the uses therein mentioned, and then declared his will to be as follows: — “ And my will and intention is, that all the said manors, messuages, and tenements, farms, lands, tithes, hereditaments, and premises so devised as aforesaid to the said *T. F. Lewis* and his heirs, shall continue liable and charged, exclusively of my personal estate, with all the mortgages and bond debts which when I die shall be charged upon the same and unpaid, such debts having all accrued by my wish to create an improvable permanent fund for the provision of my present large family. And I further give and devise my personal estate to the said *Roger Frankland* and *John Nicholas*, and the survivor of them, and the executors, administrators, and assigns of such survivor, that is to say, my leasehold house in which I reside in *Wimpole Street*, my insurance of 5000*l.*, payable by the Equitable Insurance Company. Also my insurance of 3000*l.*, payable by the *London* Life Insurance Company; and my insurance of 2000*l.*, payable by the *Sun* Fire Insurance Company; my security in the turnpikes (therein described); my rents in arrear; my salary of office; all

*Will.**Bequest of personally partly enumerated.**Debts.*

R. N. by his will, gave all his personal estate to *R. F.* and *J. N.*, that is to say, (he then enumerates several particulars) in trust for the following purposes: that the same be not liable or resorted to for the payment of mortgages or bond debts, until the legacies, debts, and charges thereinafter mentioned should be satisfied; and as soon as that could be effected, the same was to be resorted to

in relief of his real estate. The testator then gave several legacies to his wife and children; and bequeathed the residue, after the respective charges thereby made thereon, to his eldest son.

Held, that the residue, as well as the enumerated articles, were subject to the charges in the will mentioned.

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and whatever monies I may at such time have in the funds, and the interest thereof, and other monies whatsoever, in trust for the following purposes, that is to say, I hereby will and declare, and it is my will and intention, that the same be not liable or resorted to for the payment of my mortgages or bond debts, or for my aforesaid annuities and legacies, until the legacies, debts, and charges *hereinafter* mentioned shall be satisfied and paid; and when and as soon as that can be effected, it is my will and intention that the same shall and may be liable and resorted to for relief of my said real estates. And I therefore first will and direct that my simple contract debts be paid thereout, and then I give therefrom to my dear wife *Anne*, if she survive me, the sum of 700*l.*, without interest, to be paid to her within seven months after my decease." And he then gave the sum of 300*l.* to trustees, who were to pay the dividends thereof to his wife for her life, if she continued his widow; and in the events therein mentioned the 300*l.* was to be residuum of his personal estate. And the testator gave to his children other legacies, and an annuity to his wife's parents, and further declared his intention as follows: "And I give all the rest and residue of my goods, chattels, personal estate and effects whatsoever, which shall remain *after the respective charges hereby made thereon*, to my dear son *Edward Nicholas*, or such other as shall be my eldest son at the time of my decease; or in case of the death of all my sons before me, to my then eldest daughter."

By a decree made in this cause on the 1st *December* 1827, the Master was directed to take the accounts of the personal estate; and, in doing so, to distinguish between such parts thereof as consisted of the particulars mentioned in the will, and such parts thereof as constituted the rest and residue of such personal estate and effects. The Master found, and by his report certified,

that the rest and residue of the testator's personal estate, consisting of particulars set forth in the third schedule thereto, received by *Edward Nicholas*, amounted to the sum of 349*l.* 8*s.* 7*d.*, and that there were some other particulars then outstanding.

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This cause now coming on for further directions, the question was, whether the whole of the personal estate of the testator passed to *R. Frankland* and *John Nicholas*, and was by the will (after payment of the simple contract debts and legacies charged thereon) subject to the payment of the testator's bond and mortgage debts in exoneration of his real estates.

Mr. Bickersteth and *Mr. Tennant*, for the Plaintiffs, the widow and younger children, contended that the will was clear; that the testator by his first gift intended to comprise the whole of his personal estate, such words as 'scilicet' are merely words of suggestion or amplification, and are not words of restriction or exception.

Mr. Treslove and *Mr. Roupell jun.* for the Defendants. Why should there be this extensive specification if the testator meant the whole of his personal estate, which might have been described as his personal estate? Nothing but the enumerated articles can pass (a); at least, connecting the general clause with the special clause, there is certainly a doubt whether the whole personal estate passed by the first bequest. Where there is a clear intent to pass the whole, the Court will enlarge the specified terms (b); but when such intent does not appear, the Court will not do so. The case before the Court does not come within that class of cases in which the Court struggles to prevent intestacy, for here the residue is

(a) *Wild v. Holtzmeyer*, 5 *Ves.* 310.

(b) *Chalmers v. Storil*, 2 *V. & B.* 222.

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disposed of. (a) The intent of the testator was, that the personal estate generally should be exempted from the mortgage and bond debts which he charged upon the realty; and that is not inconsistent with his carving out a portion of the personal estate. (b)

The MASTER of the ROLLS.

The testator meant to subject his whole personal estate to the same trusts as he has declared with respect to his house in *Wimpole Street*, and the other enumerated articles. He gives his personal estate to his executors, and proceeds to enumerate it. It so happened that he omitted some particulars. He directs what they are to do with the subject of the gift: to pay certain debts, legacies, and charges, and concludes with a residuary gift, "I give all the rest and residue of my goods, chattels, personal estate and effects whatsoever, which shall remain after the respective charges hereby made thereon, to my son *Edward Nicholas*."

Now what had he affected with those charges? Why he had affected his whole personal estate. It is perfectly clear what the intention of the testator was.

Declare that the residue comprised in the third schedule to the report, is subject to the charges with the other personal estate enumerated.

By the decree it is declared that the general personal estate passed to *Roger Frankland* and *John Nicholas*, and ought to be applied in or towards payment of the bond and mortgage debts of the testator in exoneration of the real estate.

Reg. Lib. B. 1829. fol. 301.

(a) *Rawlings v. Jennings*, 13 Ves. 59.

(b) *Howard v. Lord Rous*, 18 Ves. 131.

REPORTS OF CASES

ARGUED AND DETERMINED

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IN

The High Court of Chancery.

HARRISON v. HARRISON and Others, and His
Majesty's Attorney-General.

ROLLS.
December 5.

HENRY HARRISON, by his will, after giving 1000*l.* to his wife in lieu of dower, and several small legacies, and directing the produce of his real and personal estate to be invested, and the dividends or annual income thereof to be applied for the use and benefit of his wife and daughter and the survivor of them, directed that the principal monies should be applied in payment of the several legacies thereafter mentioned: they were legacies to relations and other persons, and several legacies of 100*l.*, 200*l.*, and other sums, to eleven different charities; and after the death of his wife and daughter, the testator declared, that the trustees of his will should stand possessed of the residue of his personal

Devise and Bequest.

Charities.

Mortmain.

Mortgages.

Monies arising from sale of lands.

Testator directed the produce of his real and personal estate to be invested.

Part of the personalty consisted of mortgages and securities

on real and leasehold estates.

Part consisted of a sum of money due on a covenant to sell a freehold house.

Testator gave various legacies to charities.

He also gave the residue to charities.

Held void as to the mortgages and money due on the sale of the freehold.

The charities to abate *pro rata* in respect of the legacies and residue.

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estate, in trust for the same eleven charities. This bill was filed by the next of kin of the testator's daughter, *Mary Lydia Harrison*, and prayed, that the devise and bequest by the testator to the treasurers of the several charities of his freehold and leasehold premises, and of the monies to be produced or to arise by the sale thereof; and also of the monies due to the testator at the time of his death on mortgage, secured by the deposit of title-deeds, or otherwise connected with real estate, should be declared void by force of the statute, and that the testator should be declared to have died intestate with respect thereto; and that the usual accounts might be taken by the Master.

At the original hearing, it was referred to the Master to take an account of the personal estate, and the Master was to distinguish what part of the personal estate did not consist of leasehold property, or of money lent upon mortgage, or upon the deposit of title-deeds, or was otherwise connected with real estate. And the Master was also to state, what real and leasehold estates the testator died seised or possessed of, and what part of the testator's personal estate was, at the time of his death, outstanding upon mortgage, or upon the security of title-deeds deposited with him, or otherwise connected with real estate.

The Master found, that the testator, at the time of his decease, was possessed of a freehold house, which he had demised for a term of seven years, and covenanted to convey at the expiration of the term, in fee, upon being paid 700*l.*; this term expired after the death of the testator, who, by his will, directed the sale to be completed; and the lessees were ready to pay the 700*l.* and complete the contract on their

part. The Master also reported, that the testator was possessed of a leasehold house; that he was entitled to 3000*l.*, secured by mortgage of freehold and leasehold premises; to a sum of 200*l.* on a promissory note, accompanied by a deposit of a lease for a term of years; to a further sum of 700*l.* secured by a mortgage of copyhold premises; and divers other sums of money, secured on mortgage of freehold and leasehold property. The amount of all the sums arising from leasehold estates, and secured on mortgage and otherwise on real estate, was 6829*l.*; and the amount of the other sums, not arising from leasehold estates or money secured on mortgage, was 6041*l.*

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The several pecuniary legacies were paid some time since.

The legacies, and funeral and testamentary expenses (except the legacies to charities, and also the legacy to the widow, which had been satisfied by a transfer of stock), amounted to 4876*l.*; and, in fact, the pure personal estate, unconnected with realty, amounted to what was almost sufficient to cover the charitable as well as the other legacies.

The contract for the freehold house has since been carried into effect.

Mr. *Bickersteth* and Mr. *Jeremy*, for the Plaintiffs, contended that the gift to charities of so much of the general estate as was connected with the realty would fail (a), and go to the next of kin. There were many cases on this subject.

(a) 9 G. 2. c. 36.

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Mr. *Wray*, for the Attorney-General.

The testator having contracted in his lifetime for the sale of the freehold, it became personal estate; and in the case of *Jemmett v. Virrill* Lord *Gifford* held that it became personal estate.

This point then stood over to be argued on the *Monday* following.

December 5. This cause was again mentioned.

The MASTER of the ROLLS, after adverting to the words of the will, proceeded thus:

The mortgagee has the legal estate in the land, subject to redemption. If the mortgagor does not redeem, the mortgagee becomes the absolute owner; and, therefore, it is an interest in land within the meaning of the statute. Now where is the difference between a mortgagee and a vendor under a contract only, no money having been paid? Is the mortgagee possessed of the legal estate? So is the vendor. If the mortgage is not paid, the estate of the mortgagee becomes absolute. So if the vendee does not pay the purchase-money, the vendor retains the absolute property of the land. This, therefore, is an interest charging the land; and though it does not come within the words of the statute, is plainly within its equity.

A bequest to the widow of testator in lieu of dower does not preclude her from her claim on the personal estate as the widow of a freeman of *London*.

Another point in this case was this: the testator, by his will, gave his wife 1000*l.* in lieu of dower.

The testator, as was found by the Master's report, was a freeman of *London*; and it was urged that the legacy barred her customary rights to the personalty as the widow of a freeman.

The Court held that the widow was bound to elect between her dower and the 1000*l.*, but that she was not by that bequest precluded from taking any part of the personal estate to which she was entitled as the widow.

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Decree. The funeral and testamentary expenses, debts, and legacies (except the legacies to charities), and the costs, to be paid out of the pure personal estate and his personalty connected with real estate, *pro rata*.

So much of the charity legacies as is proportioned to the amount and value of the personal estate as consisted of mortgages, money lent upon the deposit of title-deeds, leasehold, and other interests in, or any charges or incumbrances affecting real estate, is void by virtue of the statute 9 G. 2. c. 36.

So much of the charity legacies as is proportioned to the amount and value of the other parts of the personal estate, is good.

The gift of so much of the residue of the testator's personal estate as does not consist of mortgages, money lent upon the deposit of title-deeds, leasehold and other interests in, or any charges or incumbrances affecting real estate, is good.

So much of the residue as consists of mortgages, &c., is undisposed of, and is divisible between *Mary Harrison*, the widow, and the next of kin of the testator living at the time of his death, and their representatives.

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The testator having been a freeman of the city of *London*, the widow is entitled to four ninths, and the other five ninths go to the administrator of the testator's daughter, his only next of kin.

The covenant in the lease did not convert the proceeds of the sale of the freehold house into pure personality, so as to exempt it from the 9 G. 2. c. 36., and the same is to be considered as part of the testator's property connected with the real estate.

The widow is entitled to the 1000*l.* bequeathed to her in bar of dower, and she is not by the bequest thereof precluded from taking any part of his personal estate to which she is entitled as such widow.

Bequest of a sum of 50*l.* to each of the three children of *A.* Now *A.* had five children: Held, that each child was entitled to 50*l.*

The testator having also given to the two sons and the daughter of *Thomas Lovell* 50*l.* each, and the Master having reported that *Thomas Lovell* had in fact five children, viz. one son and four daughters, the Court decreed that the five children were severally entitled to 50*l.* each. (a)

Reg. Lib. A. 1829. fol. 493.

(a) See *Tomkins v. Tomkins*, 3 Atk. 257. and 2 Ves. 564. *Garcey v. Hibbert*, 19 Ves. 125. *Stebbing v. Walkey*, 2 Bro. Ch. Ca. 85.; 1 Cox, 250. *Scott v. Fenhoulet*, 2 Bro. C. C. 86. and *Sleech v. Thorington*, 2 Ves. 560.; and see note to *Parsons v. Parsons*, 1 Ves. jun. 267. 2d edit.

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Lord DORCHESTER and Others v. The Earl of
EFFINGHAM and Others.

ROLLS.
December 16.

THIS was a suit for carrying into execution the will of the late Lord *Dorchester*, and the cause now coming on for further directions, the question was, Whether Mr. *T. P. Courtenay*, the surviving executor, should be personally charged with the loss of 1577*l.* 14*s.* 2*d.* occasioned by the failure of Messrs. *Goodall* and *Turner*, or that the loss should fall upon the estate of the testator?

Executors Liability.

Executors depositing monies belonging to the estate, with the same persons as the testator intrusted with his monies in his lifetime, although they are not bankers, are not liable for a loss sustained by their bankruptcy.

At the original hearing it was ordered, that the Master should enquire, whether any, and what sum of money forming part of the several balances reported due from the Defendants upon the several accounts in the Master's report mentioned, or which should be reported due from them, or any of them, upon the accounts thereinbefore directed to be taken, or carried on, were at any time or times, and when, deposited by the Defendants *Richard Earl of Effingham*, *Thomas Carleton*, and *Thomas Peregrine Courtenay*, or any of them, in the hands of any and what bankers or agents, or were received by such bankers or agents, and whether they at any time, and when, became bankrupts; and whether any and what sum or sums of money, forming part of such respective balances, remained in the hands of such bankers or agents at the time of their becoming bankrupts. And the Master was to state any special circumstances.

The Master by his report found, that the several sums of money therein mentioned had been received by

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Messrs. *Goodall* and *Turner* as the bankers of the executors, and that a balance of 1577*l.* 14*s.* 2*d.* remained due from them at the time of their bankruptcy. And the Master found the following special circumstances:— That the testator for several years preceding his death employed Messrs. *Goodall* and *Turner*, of *Garlick Hill, London*, merchants, as his agents in *London*, they having succeeded to the business of *Sir Brook Watson*, who was an old and intimate friend of the testator. That they were empowered by the testator to receive the dividends upon his stock, and they accordingly received the same until his death, at which time there was a balance of 265*l.* 16*s.* 8*d.* in their hands; and that after the death of the testator the Defendants, the executors, continued to employ the said Messrs. *Goodall* and *Turner* as their bankers, attornies, or agents, in like manner as they had been employed by the testator in his lifetime; and that all monies which came to the hands of the Defendants, the executors, were paid into the house of Messrs. *Goodall* and *Turner* on the executorship account of the Defendants. And he found that Messrs. *Goodall* and *Turner* were merchants trading principally to *Canada*, and not bankers generally; that a commission of bankrupt was issued against them in the month of *June* 1817, by the description of *William Goodall* and *John Turner*, of *Garlick Hill*, in the city of *London*, merchants and copartners, dealers and chapmen, upon which they were declared bankrupts; at which time there remained in their hands a balance of 1577*l.* 14*s.* 2*d.* due to the said executors as thereinbefore mentioned.

The will of the testator did not contain any clause to indemnify the trustees against any loss which might happen to the trust property by being deposited with any banker or other person for safe custody.

Mr. *Tinney* and Mr. *Walker*, for the Plaintiffs.

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Mr. *Bickersteth*, for the executors.

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Mr. *Teed*, for Lady *Dorchester* and another.

The MASTER of the ROLLS thought that no blame could be imputed to executors, who employed the same persons as the testator had placed confidence in. An executor was not chargeable unless he acted from corrupt motives, or *crassa negligentia*. It was not the practice of the Court for executors themselves to apply to pay monies into court. The Court does not act too rigidly towards executors, the office being a difficult one; if it did, no one would be found to act as executor.

His Honor decreed that the executors were not liable for the monies lost by the failure of Messrs. *Goodall* and *Turner*.

Reg. Lib. B. 1829. fol. 633.

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BETWEEN

WESTMINSTER HALL. SAMUEL LEES, - - - Plaintiff;

AND

Nov. 24. JOHN NUTTALL and WILLIAM WALKER, Defendants.

*Vendor and
Purchaser.
Attorney and
Client.*

—
An attorney having been employed to purchase an estate for his client, entered into a contract in his own name, and insisted upon holding it in his own right.

Decreed to convey to his client, the Plaintiff.

THE Plaintiff, (in right of his wife,) and her sister, as the next of kin of *Henry Wallis* the younger, were entitled for the residue of two terms of 1000 years each to certain lands within the parish of *Long Eaton* as a security for certain sums of money, and the Plaintiff was in the possession or occupation of the mortgaged premises, or in receipt of the rents and profits thereof.

The bill, after stating these facts, set forth, that the Defendant *Nuttall* was a solicitor, and had been employed by the Plaintiff to purchase the equity of redemption from Mr. *William Walker*, the heir-at-law of the Mortgagor; but that the Defendant *Nuttall* purchased the estate on his own account. The agreement between *Nuttall* and *Walker* bears date the 29th day of *March* 1824; and the bill prayed, that it might be declared that the Defendant *Nuttall* was a trustee thereof for the Plaintiff, and that he should convey the same to the Plaintiff on receiving from the Plaintiff the purchase-money.

R. Bonsell who married a daughter of the Plaintiff, *Sarah* the wife of *John Bonsell*, and *Elizabeth Lees* spinster, deposed, that the Defendant *Nuttall* was employed as the solicitor of the Plaintiff from the year 1817, up to the month of *March* 1824, and frequently

came to the Plaintiff's house on professional business. That the Plaintiff, in the presence of deponent, consulted the Defendant *Nuttall* about the propriety of purchasing the equity of redemption or reversion of the estate and premises, and that *Nuttall* advised the Plaintiff to become the purchaser, and that the Plaintiff authorised *Nuttall* to effect the purchase on the best terms he could.

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Mr. *Girling* proved a letter from *Walker* to the Plaintiff, dated the 25th of *March* 1824, offering to sell the property to him for 1200*l.*, and that he delivered it to the Plaintiff on the following day. (a)

Lees the younger deposed, that he went to the Defendant *Walker* by the direction of the Plaintiff, and told him he was come to purchase the estate, and to give him the money for it mentioned in his letter, that the Defendant *Walker* said very well, and so it was concluded; but that the Defendant *Walker* refused to go over to ——— to sign a more formal agreement by reason of his being lame, when the deponent said, we will send a lawyer over. This witness further deposed, that on the 27th of *March* 1824, he went to the office of the Defendant *Nuttall*, by the direction of the Plaintiff, and then told him that the Plaintiff had bought the estate for 1200*l.*; when *Nuttall* got up in a violent rage and began to swear, and said, "You have ruined yourself and your family, and I have been over there, what I have been building up you have been pulling down; why did not you come over to me at the first?" and afterwards *Nuttall* said, "You know I was buying

(a) This letter was, from circumstances attending it, considered to be only a proposal, and the Plaintiff's counsel then proceeded with the case on the ground of equitable fraud, and that *Nuttall* was a trustee for the Plaintiff.

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it for you." — (The rest of this witness's evidence, and the testimony of the other witnesses, are set forth in his Honor's judgment.)

Mr. Pepys and Mr. Kenyon Parker, for the Plaintiff.

Mr. Bickersteth and Mr. Thomas Parker, for the Defendant Nuttall.

Mr. Douglas, for the Defendant Walker.

The MASTER of the ROLLS.

Mr. Walker must have the bill dismissed against him with costs. *Mr. Walker*, it appears, has conveyed the fee of the estate, which carries with it the equity of redemption to *Mr. Nuttall*, consequently there is no purpose for which *Walker* could be brought before the Court. In truth the Plaintiff never had any equity against *Walker*, because the alleged agreement with *Walker* is not an agreement which, in a court of equity, would have bound *Walker*; at all events, therefore, *Mr. Walker* must be dismissed, and have his costs.

With respect to the other part of the case, however strenuously and ingeniously it may be argued, it is difficult to conceive a case more clear in point of fact than this is. *Mr. Halls* says, in the month of *March* 1824, he was present at a conversation between *Nuttall* and the Plaintiff; that the Plaintiff then explained to *Nuttall* the motives which he had to desire to become the purchaser of this particular property; that *Nuttall* strongly recommended him to become the purchaser, and that the Plaintiff gave him an authority to buy at such price as in his discretion he thought proper. The evidence of *Mr. Halls* in this respect is confirmed by two mem-

bers of the family ; they do not name the particular day, but they state the conversation precisely to the same effect as Mr. *Halls* has stated it.

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Mr. *Halls* goes on to state, that at another time *Nuttall* and he conversed together on the subject of the plaintiff's purchase; that it was observed by *Nuttall*, that the Plaintiff had no money, and that he could not become the purchaser ; and Mr. *Halls* then asked *Nuttall*, suppose I were to assist him with the money, could it be secured on the property ? Now, *Nuttall* answered it could be secured by a mortgage of the property, and *Nuttall* proceeded to say, " I think in this case it would be wise that there should be a written authority given by the Plaintiff to you and to me, (that is to *Nuttall* and *Hall*,) not only to buy the property, but to sell it again, so as to afford an immediate repayment of the money that you, *Hall*, as his friend, should advance towards the purchase." And, upon that occasion, *Nuttall* says, " I will shew you what sort of an authority it should be," and he immediately writes a paper, which is produced in evidence, in which the Plaintiff is made to request Mr. *Nuttall*, to prepare a power of attorney, to authorize him and *Halls* to purchase the property, and then to re-sell it, with a view to the payment of what should be advanced by the Plaintiff's friends. Now it is impossible to say that there can be the least doubt on these facts, that *Nuttall* had consented to become the agent of the Plaintiff for the purpose of this purchase. But suppose all this was out of the question, suppose we knew nothing of the transaction except what takes place after the agreement which is made in consequence of the intervention of Mr. *Girling*, a medical gentleman, who attended both families ; this agreement (and it is considered a parol agreement only) appears to have been made on the 24th of *March*. This

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agreement being made, Mr. *Hall* and the Plaintiff met on the 26th; they attend Mr. *Nuttall*, for the very purpose of having a regular written agreement prepared, in order to make it a binding contract. Now the very circumstance of their attending on Mr. *Nuttall* for this purpose, is a most strong corroboration of the fact, that Mr. *Nuttall* was considered by the Plaintiff as his attorney for this purpose.

When they tell Mr. *Nuttall* that the Plaintiff has engaged to pay 1200*l.*, and agreed with him to prepare a written agreement, Mr. *Nuttall* says, "Why you have thrown 2 or 300*l.* away; if *Girling* had not interfered, and this transaction had been left to me, I should have been able to have purchased this for 2 or 300*l.* less; you have in truth thrown away, therefore, this sum. Now my recommendation to you (and it is a recommendation in his character of attorney) is, that you should immediately go to Mr. *Walker*, and be off this agreement if you can." This is the recommendation that Mr. *Nuttall* gave.

Well, now, suppose there was nothing else in the case; here these parties apply to Mr. *Nuttall* as their solicitor with respect to this purchase, as their agent in this purchase, and he advises them, that they have given too much, and recommends it to them to endeavour to be off the bargain. They are not, however, at all disposed to follow this advice, they are content with the sum which is agreed to be given. Now, this is on the 26th; on the 27th, there is a conversation with Mr. *Halls*, and he repeats to Mr. *Halls* what he had said to *Girling* and the Plaintiff's son, he tells him they have given this sum of money, and that he considers it was so much money thrown away. The 27th happened to be on *Saturday*; on the *Monday*, Mr. *Nuttall* goes to

Walker and enters into a written agreement with him to purchase this property, which he had told the Plaintiff's son and *Girling* that he had given 2 or 300*l.* too much for; he agrees to purchase it for 1100*l.*, giving himself, therefore, nearly 200*l.* more than he stated ought to be given, and as to which he advised them to decline the purchase because the price was excessive.

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This circumstance alone would fix on *Nuttall* the character of agent in this transaction, and would make it impossible for him to hold this purchase to his own use. I am clearly of opinion, therefore, that Mr. *Nuttall* must be considered as a trustee for the Plaintiff, and that upon payment of the purchase-money by the Plaintiff, he must be directed to convey the equity of redemption of this estate to the Plaintiff, and all other parties must join in that conveyance. Mr. *Walker* is certainly not a necessary party to that conveyance, having already conveyed the fee of the estate, which carries with it the equity of redemption to the Plaintiff *Nuttall*.

The Plaintiff must pay *Walker* his costs of this suit; and Mr. *Nuttall* must pay to the Plaintiff his costs, excepting the costs to be paid by the Plaintiff to *Walker*.

Reg. Lib. B. 1829. fol. 513.

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BETWEEN

ROLLS.
December 9.

EDWARD BEASTALL, and MARY ANNE, his
Wife, and JANE SWAIN, an Infant, by the said
EDWARD BEASTALL, her next Friend, Plaintiffs;

AND

JOHN SWAIN, GEORGE BELL, and HAN-
NAH, his Wife, ANN SWAIN, Widow, and
JOHN ROADHOUSE, and ELIZABETH, his
Wife, - - - Defendants.

An old gentle-
man, who had
several chil-
dren and
grandchildren,
had made and
executed two
wills, and dis-
putes having
arisen in the
family about
them, some of
the oldest
members of it
entered into
an agreement
amongst
themselves for
a division of
his real and
personal
estate. This

IN the month of *October*, 1815, *William Swain*, the
grandfather of the Plaintiffs, had living three
children, *viz. John Swain, Hannah*, the wife of *George
Bell*, and *Elizabeth Swain*, afterwards the wife of *Wil-
liam Wilford*, and now the wife of *John Roadhouse*.

In the same month, *William Swain* had two grand-
children; the son and daughter of his son *William
Swain*, then deceased, *viz. the Plaintiffs, Jane Swain*,
and *William Swain* now deceased.

In the same month, *William Swain*, the grandfather,
had three grand-children, the children of his daughter,
Ann Healey, then also deceased, *viz. George Healey* and

was to be taken the next day, to the testator, for his approbation, and he was to be desired to cancel both wills. In the course of the night the testator died.

The personal property was divided according to the agreement, and a deed of covenant was executed with respect to the appropriation of the real estate; which deed, the party, whose rights under the last will would be much diminished by it, understood to be a deed for carrying the first agreement into execution; but, in fact, the two instruments differed in many particulars: Held, that the first agreement was only a recommendation to the testator, and could not be carried into effect in equity: Held, that the second agreement or deed differing from the first agreement, whilst it was understood to contain corresponding provisions, could not be carried into effect. No costs given, the Defendant having secluded the testator from the other members of the family.

William Healey, and the Plaintiff *Mary Ann*, now the wife of *George Beastall*.

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In the same month, *W. Swain*, the grandfather, duly made and published his last will and testament in writing, bearing date the 10th *October* 1815, attested, as by law required, for passing real estates, and thereby gave and devised his estates at *Gunby* and *Sewstern*, unto *Christopher Compton* and *George Bell*, their heirs and assigns, in trust to sell the same, and by means thereof to secure 500*l.* for the benefit of the Plaintiff *Mary Ann Beastall*; and as to the residue of the monies so to arise therefrom, for the benefit of the Plaintiff *Jane Swain* and *William Swain* the grandson, and the survivor of them; but in the event of both of them (*William Swain* the grandson, and the Plaintiff *Jane Swain*) dying under the age of twenty-one years, then the Plaintiff *Mary Ann Beastall*, and all his (the testator's) children who should be then living. And the testator then proceeded to dispose of his personal estate and effects, by giving legacies to *John Swain*, *Hannah Bell*, *Theodosia Glen*, and *Elizabeth Roadhouse*. The testator afterwards made a codicil to his will, dated the 22d *May* 1816, and thereby gave other legacies.

In the month of *July*, 1817, *William Swain*, the grandfather, was about eighty years of age, and residing at *Eaton*, with his daughter *Elizabeth*. The testator, having removed to the house of *John Swain*, made another will in *July*, 1817, whereby he devised his real estates to *Christopher Compton* and *George Bell*, for 1000 years, to raise 500*l.* for *Mary Ann Beastall*; and subject thereto he gave his estates to *William Swain* the grandson, his heirs and assigns for ever, when he should have attained his full age of twenty-one years; but, in case his said grandson should die under that age, then he devised his

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estates to *John Swain*, his heirs and assigns for ever: he then gave several legacies, and the residue to *John Swain*.

This will having come to the knowledge of the other children, they threatened to dispute the same, and thereupon an agreement was entered into, bearing date the 12th *March*, 1818, between *John Swain* of the one part, and *Elizabeth Swain*, (now *E. Roadhouse*, and a Defendant in this suit,) and the Defendants *George Bell* and *Hannah* his wife, of the other part, reciting the particulars of the testator's property, and that for the purpose of making a fair and just division of his property unto and amongst his family, and to prevent litigation in case of his death, it had been mutually agreed, and it was thereby witnessed, that the estates at *Sewstern* and *Gunby* should be conveyed in trust for the Plaintiff *Jane Swain* and *William Swain* the grandson, their heirs and assigns, subject to the payment of 500*l.* to *Mary Ann Beastall*, and an annuity to the testator's sister, with an executory limitation over to all the surviving children of the testator, in the event of their deaths under twenty-one, and subject to the life estate of the widow of *William Swain* the son.

The agreement provided for the distribution of the other property of the testator, of which 825*l.* was to be paid to *John Swain*, 1612*l.* to the Plaintiff *Elizabeth Roadhouse*, and 1312*l.* to *George Bell*, in right of his wife, and the residue was to be divided between those three.

The testator died the morning after this agreement was executed, and in *April*, 1818, *John Swain* proved the will of *July* 1817.

The *personal* property of the testator was divided according to the agreement.

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By an indenture bearing date the 17th *August* 1818, between *John Swain* of the first part, *William Wilford* and *Elizabeth* his wife, then *Elizabeth Roadhouse*, of the second part, and *George Bell* and *Hannah* his wife of the third part, reciting the will bearing date the 29th of *July* 1817, and that the testator died on the 13th day of *March* 1818, without having altered or revoked his will, leaving *John Swain*, *Elizabeth Wilford*, wife of *W. Wilford*, then *Elizabeth Swain*, spinster, and *Hannah Bell*, his only children, and *William Swain*, *Mary Ann Healy*, and the Plaintiff *Jane Swain*, his grand-children, him surviving; and further reciting that the will conferred greater benefit on *John Swain* than was intended for him by a certain other will made by the testator, bearing date the 10th day of *October* 1815, and that disputes had arisen, and were then depending, between the parties touching the will of the 29th day of *July* 1817, and the validity thereof, so far as the same will purported to confer a greater benefit upon *John Swain* than the benefit intended him by the will of the 10th day of *October* 1815, and that the parties thereto had agreed to compromise their disputes; and in regard to the said estates they had agreed that the same should be conveyed and assured so and in such manner that upon the happening of the contingency, and the event of *William Swain* the grandson dying before he attained twenty-one years, the messuage, land, tenements, and hereditaments might thereupon be and become effectually vested in fee tail general in the testator's grand-daughter, the Plaintiff *Jane Swain*, with remainder in fee simple to *John Swain*, *Elizabeth Wilford*, *Hannah Bell*, and *Mary Ann Healy*, as tenants in common, subject nevertheless and without

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prejudice to the payment of two several sums of 500*l.* and 200*l.* charged thereon by the will of the 29th of *July* 1817. It was witnessed that, in consideration of the premises, *John Swain*, for himself, his heirs, executors, and administrators, covenanted with *George Bell*, his executors and administrators, in trust for himself and all others whom the covenants thereafter contained did, should, or might concern, that he, *John Swain*, and his heirs, should at all times thereafter, upon every reasonable request, do and execute all acts and deeds for lawfully and satisfactorily conveying and assuring the said estates, pursuant to the agreement of compromise; and further, that *John Swain* and his heirs should, upon the happening of the contingency, and in the event of *William Swain*, the grandson of the testator, departing this life before attaining twenty-one, thenceforth in the mean time, and from time to time until such assurance should be made pursuant to the covenant in that behalf thereinbefore contained, stand and be seised of or entitled to the estates, in trust for the Plaintiff *Jane Swain*, in fee tail general, with remainder to *John Swain*, *Elizabeth Wilford*, *Hannah Bell*, and *Mary Ann Healy*, in fee simple, as tenants in common.

By a certain bond or writing obligatory under the hand and seal of *John Swain*, he bound himself unto *George Bell* in the penal sum of 3000*l.*, with a condition that if *John Swain*, his heirs, executors, administrators, or assigns, should perform and keep the covenants and agreements contained in the indenture or agreement of the 17th of *August* 1818, then the bond or obligation to be void.

Christopher Compton, the co-trustee, is dead, and *William Swain* the grandson died in the year 1820,

intestate, unmarried, and without issue. *John Swain* brought ejectments on the demise of himself and *George Bell*, to obtain possession of the estates. The bill charged that *George Bell* had destroyed the bond, and executed a release thereof to *John Swain*, and prayed that the destruction or cancelling the bond, or the release or discharge thereof, might be declared a fraud against the Plaintiffs, and a breach of trust by the Defendant *George Bell*, and that such release or discharge might be delivered up to be cancelled, and that the Plaintiff *Jane Swain* might be declared entitled to the benefit of the covenants and agreements contained in the indenture and bond, and to have the same specifically performed and carried into execution; and that the estates might be conveyed, and settled and assured, according to the covenants contained in the indenture, so far as the same was capable of being so conveyed; that is to say, to the Plaintiff *Jane Swain* in fee tail general, with remainder to *John Swain*, *Elizabeth Roadhouse*, *Hannah Bell*, and the Plaintiff *Mary Ann Beastall*, in fee, subject to the charge of 500*l.* in favour of the Plaintiff *Mary Ann Beastall*; or if it should appear to the Court that the covenants and agreements contained in the indenture and bond ought not to be specifically performed, then, that the agreement of the 12th *March* 1818 might be decreed to be specifically performed by the parties thereto, and in particular by the Defendant *John Swain*.

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On the part of the Plaintiffs, there was evidence that *John Swain* kept the testator in his house, and prevented any access to him by his children and grand-children.

There was also evidence that the agreement was entered into in consequence of disputes in the family, by way of family arrangement, and to avoid litigation. On

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the part of the Defendant there was evidence that *John Swain*, in executing the deed, understood that the effect of it was to carry the agreement into execution.

There was also evidence, that at the time of entering into the agreement, it was settled that it should be taken to the testator for his approbation, and that both wills should be cancelled by him, but that the testator died before the party intrusted with it could get to the residence of the testator.

Mr. Bickersteth and *Mr. Wakefield* for the Plaintiffs.

Mr. Pemberton and *Mr. Barber* for some of the Defendants.

Mr. Richards for the other Defendants.

The MASTER of the ROLLS.

It is extremely true, that the agreements, upon the face of them, appear to be family arrangements; and with respect to them, the Court does not attend to points which it requires in other agreements. (His Honor here stated the wills and the facts.)

John Swain induces his father to remove to his house, and a will is then made, by which *John* is to have the whole estate, if *William*, his nephew, should die under twenty-one; and the whole personal estate. The will becoming known, created great discontent in the family. On the 12th *March* 1818, an agreement is entered into, and by that agreement the interest of *John* is greatly diminished. It was the intention of the parties to communicate the agreement to the testator for his approbation; this was not carried into effect, the testator dying on the follow-

ing day. The first question is, if it were the intention of the parties to the agreement only to recommend the testator to make a new will to carry the agreement of the 12th *March* into effect? *Jane Swain* too was then an infant. It would be impossible to carry into execution the agreement of the 12th *March*; it was not an agreement to operate without the approbation of the testator. Then, as to the subsequent arrangement, that does not carry into execution the agreement of the 12th *March*; and it was the intention of *John* so to do, he having divided the personal property. It is impossible for the Court to execute the deed, when it is in evidence that he intended to carry into execution the first agreement.

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I must dismiss the bill; but, from the conduct of *John*, in confining the testator, I shall not give costs.

Reg. Lib. A. 1829. fol. 167.

BAILY v. TAYLOR.

ROLLS.
December 9.

THE Plaintiff is the author of a book entitled "Doctr-
trine of Interest and Annuities," and of another book
entitled "The Doctrine of Life Annuities and Assur-
ances;" and he is also the author of a book entitled

Copyright.
Calculations.
Costs.

The Court
does not give
an account of

the sale of a pirated copy of a work, unless it grants an injunction.

The injunction is the ground of the account.

That injunction may be granted at the hearing.

The account is consequential.

The Court will not grant an injunction after a considerable lapse of time; and where a piracy is only of a small part of a work, and is itself a matter of calculation, the Court was of opinion that to interfere would not be a fair exercise of its jurisdiction.

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"Tables for the purchasing and renewing of Leases for Terms of Years certain, and for Lives, with Rules for determining the Value of the Reversion of Estates after any such Leases, and for the Solution of other useful Problems adapted to general use;" each of which works contained various tables and calculations. The first work was published in 1808, the second in 1810, and the third in 1802; of the last work three editions had been published, of the two latter only one.

In 1811, the Defendant published a book, entitled "Tables for the purchasing of Estates, freehold, copyhold, leasehold, Annuities, &c.; and for the renewing of Leases held under Cathedral Churches, Colleges, or other Corporate Bodies, for Terms of Years certain and for Lives, together with several useful and interesting Tables connected with the subject; also five Tables of Compound Interest." Thirteen of the tables of the Defendant's work had the appearance of being copied from the Plaintiff's tables, but nine of them were traced to former works. The Plaintiff called upon him, and desired him to discontinue the publication or expunge the tables; but at length consented to the publication of that edition, provided a new preface were printed to it, containing the following words: — "It may be proper here to say, that some of the tables originally appeared in the works of Mr. *F. Baily* on leases and on annuities, from which they have been selected."

On the 19th *December* 1811, the Defendant sent the Plaintiff a printed copy of the book, with the following letter: —

"Sir, — I do myself the honour to send, for your acceptance, a copy of Mr. *Inwood*'s tables, with the new

preface, containing the paragraph proposed by you respecting your works. This will be inserted in all the books which remain unsold by,

“ Sir, your very humble servant,

“ Jos. TAYLOR.

“ 59. *Holborn*, Sept. 19th 1811.”

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The bill was filed on the 18th of *August* 1824, and stated, that the consent given by the Plaintiff was only to the first edition; and the Plaintiff charged, that since 1811, the Defendant had printed a great number of copies of his work, containing the Plaintiff's tables, and sold them as copies of the first edition; and that the Defendant had also published second and third editions; and the bill prayed for an account and injunction.

The Defendant by his answer stated, that most of the tables in the Plaintiff's books were copied from old works, and that the computations of the other tables were so simple and easy, as to be little beyond a mere mechanical operation; and the Defendant said, that the object of the Plaintiff in making the application to him was, to obtain the gratification of the complimentary notice of his works in the preface, and not as acknowledging any right in the Plaintiff to any part of the Defendant's work, or that he had any ground or intended to complain thereof, either at law or in equity; and the Defendant considered all questions between him and the Plaintiff set at rest: and the Defendant further said, that he never considered what then passed between him and the Plaintiff confined to the first edition of the Defendant's work, but that the same extended to further editions thereof; and the answer further pointed out the difference between his tables and those of the Plaintiff.

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BAILY
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In 1824, the Plaintiff applied to the Vice-Chancellor for an injunction, which was refused. On the part of the Plaintiff there was the deposition of one witness, who proved that he was present at an interview with the parties in 1811, when the Plaintiff remonstrated strongly against publishing the book, and threatened to take measures to put a stop to the sale thereof; and the Defendant then acknowledged, that the tables pointed out were taken from the book of the Plaintiff, but pleaded, that he had been put to a very great expense in publishing the book, and that it would be very hard to deprive him of the sale of it; and that the Plaintiff, at the request of the Defendant, consented that the sale of that edition (being the first edition) might continue, on condition that in all the future copies which the Defendant should sell, he should introduce a new preface, in which an acknowledgment should be inserted, that the tables so printed had been copied from the works of the Plaintiff, the Plaintiff expressly limiting that privilege to the then first edition of the book or work.

This, however, as has been previously stated, was denied by the answer.

The evidence of the Defendant went to prove, that the calculation necessary for forming these tables would cost but a few pounds.

The MASTER of the ROLLS.

Does not the jurisdiction of this Court depend entirely upon the injunction? I should like to have this point argued. I have a recollection of cases that determine that the injunction is the ground of the account: it is the injunction that gives the account, the remedy is by an action at law; in aid of the action you may file a

bill of discovery. The account is merely consequential. I think, upon general principle without authority, it must be so.

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(To stand over for argument on this point.) (a)

(a) The Editor has been supplied with the following report of the judgment of the Vice-Chancellor on the motion for an injunction, but he cannot answer for its accuracy.

The VICE-CHANCELLOR. The question here is, whether this be a case for the extraordinary interposition of a court of equity; whether this Plaintiff has made out a probability of injury so great and of so much importance as to entitle him to call for redress, and that it is fit that a court of equity should interfere; or whether he should be left to pursue his remedy at law? Now the facts of the case, independently of the licence, are these:—The Plaintiff publishes three works of great bulk, one of the works being two octavo volumes, another one octavo, and a third likewise in an octavo volume; and he says, there are thirteen tables published by the Defendant, in a small work selected from these three great works, and which thirteen tables are in truth copies; the Plaintiff then goes on to state, that the thirteen tables so copied are the work of calculations published by him, and so I take the fact to be; but, in truth, every one of these thirteen tables, except four, were calculated before the Plaintiff's work, and are existing in other works previously published; and, therefore, the Defendant considers them as not a computation on the part of the Plaintiff, upon which he is entitled to the protection of the Court under the statute. I am not, however, of that opinion; for although there were previously similar calculations, yet if they were calculated by him, although calculated by another person before him, they are a work of computation as to which he is to be protected by the statute.

1824.
December 23.

But although he be so entitled to protection under the statute, they are spread over the Plaintiff's works through these four volumes, and occupy but a small portion of the little work of the Defendant. Now what is the nature of the injury the Plaintiff complains of? His title to his own book is, that he calculated these tables; the Defendant says, that by calculating those tables he has the same right with the Plaintiff, and if the Court were to interfere to prevent such a publication only for twenty-four hours, yet in that time the Defendant might acquire the same right to these tables as any other

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December 11.

Mr. *Bickersteth* resumed the question, whether the Court could direct an account, an injunction not having been granted, cited *Doddsley v. Kinneresley*. (a)

The MASTER of the ROLLS. As the Court may grant an injunction on the hearing of the cause, I rather think the Court may, on a case shewn, grant an account.

person by such calculation. Under such circumstances, I should doubt whether it is a case for a court of equity to interfere. If it stood upon that point alone as to these thirteen tables, as his title is merely a calculation made by himself, or which he and other persons in a few hours would be competent to make, and which might be made in twenty-four hours, so as to give the Defendant a right to publish the work, I should doubt if I could, under such circumstances, interfere if the case were to rest there. But there are other grounds to induce the Court not to grant the injunction. The work complained of was originally published in 1811. The Plaintiff, considering that the publication of those thirteen tables was an injury to his work, makes a remonstrance to the Defendant, and he agrees to write in the preface an acknowledgment, that they were copied from the Plaintiff's work. Now, undoubtedly, that amounted to a license. The Plaintiff says, that although it were so stated, yet it was to be confined to the first edition only, and it was not stuck to in the original affidavit; but now, in an affidavit since filed, that statement is supported by his brother *Arthur Baily*, who was present at the time. The Defendant swears that he has no recollection of any thing as to the first edition, but understood that the Plaintiff was to allow him to continue the publication of this work in consequence of that sentence in the preface being added to it. Now, what happens? It appears that the Defendant continues to sell his first edition which goes on to the year 1820, and then he publishes a second edition, which, by a rapid sale, sold in four years, and then there was a third edition. It is only at this late period that the Plaintiff calls upon the Court to interfere, when this has been in the market for about fifteen years. Now, that circumstance alone would prevent the Court from interfering upon this occasion. Upon the whole, I think that the injunction sought for cannot be granted.

Injunction refused.

(a) *Ambler*, 403.

Mr. *Fonblanque*. But the difference of this case is, that an injunction has already been entertained by the Court, and refused.

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The MASTER of the ROLLS. I am not of that opinion; but you all concur in the opinion I expressed the other day, that the injunction is the foundation of the account; and at the hearing you have a right to insist upon the injunction.

Mr. *Wakefield*. We admit the similitude, but not the piracy.

The MASTER of the ROLLS. The Defendant has not in his answer denied that he copied the tables from the Plaintiff's works.

Mr. *West*. In *Wooler v. Whitaker (a)*, the measure of damages was the number of books sold by the Defendant. In this case it should be what our loss has been, and what benefit the Defendant has gained by the piracy, not the costs of calculating the tables. *Mawman v. Tegg (b)*, where Lord *Eldon* said, he who has made an improper use of that which did not belong to him, must suffer the consequence of so doing; if a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. He has only himself to blame.

Mr. *Fonblanque*. Your Honor being of opinion that

(a) This case was decided on the 8th of December 1817, and is cited in *Eden on Injunctions*, p. 281., under the name of *Whittingham v. Wooler*, and published from Mr. *Merivale's* manuscripts in 2 *Swanst.* 428.

(b) 2 *Russ.* 385.

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the Court can entertain the application now, I will consider it as for an injunction; for if the injunction be not obtained, the account cannot be granted. This suit was commenced in 1824, when the injunction was refused.

Your Honor then assumed that these were copies of the Plaintiff's works; that it was impossible to say the tables were the Plaintiff's permanently, for in twenty-four hours the tables might be calculated. Is there any intervening circumstance, any thing now that was not then before the Court? Rules are laid down by Sir *Isaac Newton*, *De Moivre*, and other persons, and upon their principles the calculation of our tables was made. In the case of *Burfeld v. Nicholson* (a), the Vice-Chancellor said, "Upon reference to the prior publications, it is proved to be indisputably true that there is not one of these figures which had not been given to the world prior to the *Architectural Dictionary*, and the matter not being new, the author of the *Architectural Dictionary* could acquire no property in these figures except by a new arrangement, but there is clearly no novelty in his arrangement."

If, therefore, the figures furnished by *Nicholson* for the *Practical Builder* had, in fact, been copied from the *Architectural Dictionary*, this would have been no piracy, because the author of the *Architectural Dictionary* had no property in these figures; it was his for the moment, but any other person, making the same calculation as himself, would be equally entitled to it. From the cases I can cite to the Court, I could shew that it is the injunction that gives the foundation of the suit for an account; but this seems admitted, and I shall, therefore, not trouble the Court.

(a) 2 Sim. & Stew. 7.

With respect to the damage: we could have been the owner of these tables for the sum of 10*l.*, and it is for the Court to say, whether it will take cognizance of a subject of so trifling an amount. Then with respect to the delay: the Plaintiff has lain by for thirteen years; he allowed us to publish a second edition without making any complaint, and it having been decided four years ago, that an injunction could not be granted, I submit that the Court will not now give an account.

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Mr. *Wakefeld* also for the Defendant. The Plaintiff, in 1811, complained only of tables taken from the first edition, nor did he, until 1824, file his bill in this court.

There has been an acquiescence for thirteen years. I prove four of the Plaintiff's tables not to be original, and four of easy computation, and that the whole can be calculated for 7*l.* 16*s.* This is different from works of genius and science; the calculation here is merely mechanical, the calculation of a common sum of arithmetic, and can hardly be deemed a piracy of literary property.

1st. I submit, that it is beneath the Court to entertain a suit for a property of so small a value.

2d. The tables might as easily have been copied from the old authors as from Baily.

I admit we have not traced the four tables, but still we have the licence of 1811, and we have proved that our second and third editions were publicly announced; and I submit the Court will not cut down the licence to the first edition. With respect to an injunction, the editions are all sold, and there remains nothing now on which an injunction can be granted; there may have

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been new calculations for subsequent editions of the work.

The Plaintiff has never attempted to enforce his legal right. It was held by Lord *Ellenborough*, at nisi prius, in *Cary v. Kearsley* (a), that part of the work of one author found in another was not of itself piracy, or sufficient to support an action; a man might fairly adopt part of the work of another, he might so make use of another's labour for the promotion of science and the benefit of the public; but having done so, the question would be, was the matter so taken used fairly with that view, and without what his lordship termed the *animus furandi*? If there was no part of the book that was a transcript of the other; if the subject of the book was that which was subject to every man's observation, such as the names of the places and their distances from each other, the places being the same, the distances being the same, if they were correct, one book must be a transcript of the other; but when in the Defendant's book there were additional observations, (and in some part of the work his lordship found corrections of misprinting,) while he should think himself bound to secure every man in the enjoyment of his copyright, manacles must not be put upon science. — I submit the Court ought not to grant the injunction.

Mr. *Bickersteth* (in reply). With respect to the tables that are not traced, it must be presumed that the Plaintiff computed them; the calculations require the aid of intellect, and that of a very high character. The Defendant's witness, in forming a calculation of the expense, says, he lays out of consideration the skill in the selection of

(a) 4 *Esp.* 172. See also *Wilkins v. Atkin*, 17 *Ves.* 424.; and *West v. Francis*, 5 *B. & A.* 737.

tables; there is here a directing mind, and your Honour adjudged in *Barfield v. Nicholson*, that a copyright may consist of an arrangement of old matter. The evidence in 1811 was, that the tables of the Defendant were copied from some or one of the works of which the Plaintiff was the author, and the Defendant in his preface says, they had appeared in the work of Mr. *F. Bailey*; the evidence is express, that the license of the Defendant to proceed, is only for the first edition. The Plaintiff had no knowledge of the second edition. Where then is the acquiescence?

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It has been said, that the tables are of such easy computation that any one can make them; but what says Dr. Price? "that to make them would be an endless labour." Whoever makes them is entitled to the benefit of them.

The MASTER of the ROLLS.

The Plaintiff's works are not mere tables, but consist of letter-press to a very considerable extent. The Plaintiff complains of the Defendant having copied eight tables from the first work, four from the second work, and one from the third. That the publication of these tables is a piracy, is out of doubt; but the question is, whether it is fit that a Court of Equity should interfere? I must consider the application for an injunction as made to me this day in *December 1829*, and I am to consider, whether a work published in 1811, is to be prohibited by an injunction in 1829; the Defendant's work was published in 1811. Is a Court of Equity to interfere after so many years have elapsed since the first publication? I am of opinion, that it would be contrary to principle were I to grant an injunction. The 300dth part of the work is pirated: is the Court to enjoin the Defendant from the publication of the whole of his work, because he has included

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a small part of the Plaintiff's work? that taken from the work of 1802 is a mere matter of calculation, and the calculation being made, the Defendant would be entitled to publish it. Would it be a fair exercise of the jurisdiction of a Court of Equity to interfere in such a case? I am of opinion that it would not. How could the Master calculate the value of a piracy of the 300dth part of a work? A Court of Law could best judge, and a Master would be a much less competent judge.

Upon all these grounds I am of opinion, that this is a case upon which I cannot grant an injunction, and not granting an injunction, the Court cannot decree an account. This bill, therefore, must be dismissed, and dismissed with costs.

Reg. Lib. B. 1829. fol. 368.

Dec. 11.

WHITE v. SMITH.

*Tithes.**Hedge Wood.*

Wood cut
from hedges
is titheable,
although used
on the farm.

THE only question in this case to be discussed was, whether tithes were due for some wood cut from hedges used on the farm?

Mr. Tinney and Mr. Boteler for the Plaintiff.

Mr. Pemberton for the Defendant.

Dec. 12.

The MASTER of the ROLLS said, he should make a decree both for the wood used for firing and that for hop-poles, in consequence of a decision of the Court of Exchequer, which had been cited. (a) He could not

(a) *Willis v. Stone*, 1 *Younge & Jervis*, 268.

discover the principle on which it was made, these articles having been used for the purposes of the farm: he should not give costs. The case might be taken to the House of Lords, but he did not think the decision would be supported there.

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On referring to the registrar's book, it appears that the decree was drawn up for dismissing the bill as to certain agistment tithes, and for a general account of all other tithes, so that the point reported does not appear upon the records of the court.

Reg. Lib. B. 1829. fol. 284.

STEWART v. NICHOLLS and Others.
Original Bill.

ROLLS.
Dec. 17.

ROBARTS v. NICHOLLS and Others.
Revivor and Supplement.

*Mortgagor
and Mort-
gagee.
Practice.*

PATRICK PHILLIPS, on his marriage, settled some freehold and leasehold property on himself for life, remainder to his wife for life, remainder to the children of the marriage, remainder to himself absolutely; and by deed bearing date the 25th day of *January* 1790 he mortgaged the same, with other leaseholds, to the Plaintiff in the original suit, subject to two former mortgages.

Twenty years are not an absolute bar to a mortgagee. It is merely a case of presumption, which may be rebutted. A supplemental bill cannot be filed to an original bill in respect of which sub-pœnas have not been served.

On the 6th *May* 1794, a commission of bankrupt was issued against *Phillips*, and he was declared bankrupt.

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STEWART
v.
NICHOLLS.

The original bill was filed on the 19th of *January* 1811, but no subpoena was ever served upon the Defendants. The bill prayed redemption against one of the previous mortgagees, who still remained undischarged, and foreclosure against the assignees of *Phillips*.

The bill of revivor and supplement was filed on the 9th *March* 1825, by the executors of *Stewart*, the Plaintiff in the former suit. It set forth a former suit by one *Green*, a prior mortgagee, commenced in *Easter* term, 1796, in which the usual decree was made for taking the accounts, and for foreclosure; but before any further proceedings were had, the suit abated by the death of one of the Plaintiffs therein in 1811. That suit was revived in 1814. A receiver had been appointed in 1803, who paid the balances of the rents and profits from time to time into court. *Patrick Phillips* went to *America*, and in 1824, the Master reported that he was dead. A former mortgagee was, in that suit, paid off, out of the funds in court.

The bill of revivor and supplement alleged, that a receiver having been appointed of the rents and profits of the mortgaged premises, and the balances having been from time to time paid into court in the cause of *Green v. Nicholls*, and the principal and interest due on the mortgages in that cause mentioned being unpaid, and *James Stewart* being then ignorant that the contingent reversionary interest had become vested in *Patrick Phillips*, as thereafter mentioned, by the decease of his wife and only child, *James Stewart* was unable to prosecute his cause with effect in his lifetime; and charged, that under the circumstances aforesaid, and particularly of *Patrick Phillips* and his son residing in *America*, and

from the uncertainty concerning him and his affairs, that no presumption of satisfaction of the mortgage arose by lapse of time or otherwise.

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 NICHOLLS.

The Defendants, by their answer, insisted that the Plaintiff's mortgage must be presumed to have been discharged, and that, from the length of time, without any acknowledgment.

Mr. *Tinney* and Mr. *Wray* for the Plaintiff.

Mr. *Tinney*, after stating the facts. There is no statute of limitation applicable to mortgages, it is usual to limit twenty years as a time when the mortgage shall be presumed to be paid; but where the delay is accounted for, it is otherwise:—it was held in *Fladong v. Winter (a)*, and it was the principle of a case therein cited, of *Wynne v. Baring*, on which fifty years had elapsed, that taking this to be a case of presumption, it may be met by evidence to satisfy a jury that the debtor had not the opportunity or the means of paying.

There are two prior mortgagees who were proceeding to recover their debts, and they did not effect their object until 1824, and that sufficiently accounts for the delay.

This cannot be resisted but upon presumption of satisfaction arising from delay; when it is considered, that there were two previous mortgages, and that the property was so heavily incumbered, the presumption is rebutted; the moment an adequate cause for not enforcing the demand is shewn, there is an end of the pre-

(a) 19 Ves. jun. 196.

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sumption of delay ; the length of time that has elapsed is sufficiently answered. We find the Plaintiff making enquiries, he puts his deeds into the hands of his solicitor, and when the reversion fell into hand there arose a reasonable ground that the fund was one which would be available for his debt ; he then commenced proceedings, and until it was discovered, that there was an available fund, it would have been useless to attempt to enforce the debt ; the presumption of payment is therefore repelled.

Mr. Wray. Notice was given of the claim in 1811 to the solicitor of the first mortgagee, and all that was reasonable was done ; no conclusion of payment could be come to by this Court or by a jury ; and with respect to reversionary property, presumption of payment cannot be raised from *laches* until after it has fallen into hand.

Mr. Pemberton and Mr. Ching for the Defendant.

Mr. Pemberton. The bill of 1811 was filed in 1811, but the subpœnas were not served ; and the mere filing a bill without taking any proceedings upon it goes for nothing. A bill never can be revived to which there is no appearance, still less where no subpœnas have been served. The object of this bill is to give the Plaintiff the benefit of the suit of 1811 ; no order to revive ever has, or ever can be obtained in that suit. Are the circumstances such as to rebut the presumption of payment after thirty-five years from the execution of the mortgage ? there is nothing in the evidence to rebut it : no proceedings are taken till 1825, the mortgage was executed in 1790, this gentleman became bankrupt in 1794 ; in all cases where relief is sought in a Court of Equity, it must be within twenty

years, as was decided in the House of Lords in the case of *Cholmondeley v. Clinton*, and Lord *Eldon* held that although the Plaintiff was not barred of his writ of entry, yet a Court of Equity will not give relief after twenty years. As against by-gone rents the mortgagee can have no remedy of any kind. *Ex parte Wilson (a)*, *Gresley v. Adderley*. (b) In *Thomas v. Bridgstock* on petition before your Honour, it was held and confirmed on appeal, that the possession of a receiver was only the possession of the parties to the suit; the mortgagor might have redeemed the mortgages in the suit, and then he would have had the rents, and no other mortgagee could have any right to an account of the rents; and whatever right the Plaintiff may have against the reversion, he can have no claim upon the accumulated funds. If the Court is of opinion, that the Plaintiff is not entitled to any relief against the rents, the supplemental bill must be dismissed, because it does not pray relief out of the reversion.

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Mr. *Ching*. There are two suits now before your Honour; the first suit was instituted in 1811, on which no proceedings were had, nor was any subpoena served until 1825. The principle of this Court is to limit relief on a mortgage or bond to twenty years, unless the delay can be explained away, and the party must shew that he has used due diligence to obtain payment. The commission of bankrupt against the mortgagor was issued in 1794; would not a vigilant mortgagee have then prosecuted his demand? the amended bill was filed in 1825, a period of more than thirty years afterwards. With regard to the by-gone rents, to the funds accumulated in the cause of *Green v. Nicholls*, a receiver is appointed

(a) 2 Ves. & B. 252.

(b) 1 Swans. 573.

1829.

STEWART

v.

NICHOLLS.

for the security of the parties to the suit, and not for some bystander; that fund has since been applied to the payment of the first mortgage, and there is a fund of upwards of 5000*l.* in Court. The Plaintiff prayed in the supplemental bill to revive the suit of 1811, but he never obtained an order to do so, nor could he obtain it.

Mr. *Tinney*, in reply. Our amended bill was demurred to; the demurrer was over-ruled; the Defendants, by their answer, have answered the bill of 1811 as well as the amended bill.

The MASTER of the ROLLS. Can you file a supplemental bill, when you have not issued subpoenas on the original bill; should you not have amended the original bill?

In order to entitle yourself to a decree, you must state facts upon your bill; but here you only refer to an original bill, and you cannot file a supplemental bill, to a bill on which no subpoenas have issued.

I am of opinion, too, that I cannot presume this debt is satisfied, for the mortgage was made in 1790, and in 1794 the mortgagor became bankrupt, so that there was only four years in which the mortgage could have been paid by the mortgagor; but this Court can give no relief if there has been an *adverse* possession for twenty years. — Unless the Court be satisfied that the rents were applicable to the payment of the mortgage, would not the possession of the receiver be adverse?

Mr. *Tinney.* The possession cannot be adverse to a subsequent incumbrance, so long as the fund is held for

the benefit of the first incumbrancer, so long as he remains unsatisfied; in the meantime the interest in possession of the subsequent incumbrancer does not begin.

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 STEWART
 v.
 NICHOLLS.

The cause was then directed to stand over.

Mr. *Pemberton* stated that his client was not disposed to contend this cause on the point of pleading; and after what the Court had said, that there was not a presumption of payment, he would consent to the Plaintiff having his 1200*l.* out of the fund, on being paid the costs in this suit.

Thursday,
 Dec. 17.

The MASTER of the ROLLS. That is very candid; I am of opinion that there was no presumption of payment. Declare that presumption of payment does not arise in this case from delay in bringing forward the demand of the Plaintiff. Let the sum of 1200*l.* 3 per cent. consols be sold out of the funds in Court in the cause of *Green v. Nicholls*, and let the costs as between solicitor and client be paid out of the 1200*l.*, and the accumulations of the proportion of dividends thereof; and let the residue of the fund be transferred to the Plaintiffs in full satisfaction of the principal and interest and costs due on their security; and let them at their own costs in all things execute an assignment of their security to the Defendants as assignees, and deliver up the title deeds in their hands; and such assignment to be settled by the Master in case the parties differ.

Mr. *Tinney* said he had found a printed copy of the judgment in the House of Lords, in the case of *Cholmondeley and Clinton*, and there was nothing in it applicable to the case of mortgagor and mortgagee; Lord *Eldon* therein stated, that he did not mean that it should;

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STEWART

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NICHOLLS.

and Mr. *Tinney* added, that it was clear that twenty years was not an absolute presumption of payment.

The MASTER of the ROLLS. I should certainly never extend it to mortgagor and mortgagee myself.

The MASTER of the ROLLS asked Mr. *Tinney* what he had found on the point of pleading.

Mr. *Tinney* replied that he had only found that from which he hoped to have obtained liberty to amend.

Mr. *Wray* wished the Court to understand that he had always seen the difficulty in the point of pleading.

Reg. Lib. B. 1829. fol. 209.

ROLLS.

1829.

Wednesday,
December 2.

Power to ap-
point new
trustees.

SOUTHWELL v. WARD.

MR. *KOE*. This is a suit for the appointment of new trustees. There is no power in the deed for the appointment of new trustees; but it is wished, in the new deed, to add such a power.

The MASTER of the ROLLS. That cannot be.

1829.

HUDSON v. TWINING.

Wednesday,
December 2.

IN this case, a testator had by his will, in 1752, given Parties.
legacies to several persons on their attaining twenty-one. One of them went to *America* when a boy, and had not since been heard of; if living, he must now be seventy-seven years of age. His legacy had been handed over many years since to the Defendants, who had, by accumulations of interest, now made it amount to six-fold; and this bill was, by his personal representatives, for payment thereof to them.

The MASTER of the ROLLS. Take an enquiry, whether he attained the age of twenty-one, and whether he is living or dead, with liberty to report special circumstances.

Mr. *Roupell* here stated to the Court, that an objection was taken in the answer, that the personal representatives of the original testator were not parties. The testator died seventy years since.

The MASTER of the ROLLS thought that it was not necessary to make them parties.

1829.

ROLLS.

Dec. 9.

NEATHWAY v. HAM.

*Legacy.**Misnomer.**Evidence.*

A legacy having been given to a legatee in a name which she had for many years assumed, the Court will direct an enquiry, who was the person meant.

The deposition of an admission of a residuary legatee and executrix is good evidence, it being against her own interest.

GEORGE BRIDGE, who died in 1822, by his will gave to *Mary Bridge*, whom he described as his cousin, daughter of _____, the sum of 200*l.*, and appointed his wife residuary legatee and sole executrix; but the wife died in *November 1824*, without having paid this legacy, and by her will gave to *Mary Hillditch*, if living, 100*l.* stock.

The facts were that *George Bridge* and the legatee in his will were fellow-servants; she had a natural child by him, and afterwards went by the name of *Mary Bridge*. Her proper name was *Mary Hillditch*.

A witness proved, that after the death of *George Bridge*, on reading his will to his widow, she said that the real name of the said legatee was *Mary Hillditch*, and that *Mary Hillditch* had formerly been a kitchen-maid in the late Earl *Dorchester's* service; and that she (*Ann Bridge*) had known *Mary Hillditch* at that time, and was a fellow-servant of hers and of *George Bridge*; and that *George Bridge*, previous to his marriage with *Ann Bridge*, had had a child by the said *Mary Hillditch*, and that she (*Ann Bridge*) was aware of the fact at the time of its taking place; that after that event *Mary Hillditch* had passed and been called by the name of *Mary Bridge*; and that her husband *George Bridge* had told her, after making his will, that he had left a legacy to *Mary Hillditch* by the name and description of *Mary Bridge* his cousin, but had omitted to mention the name of the legatee's parents from motives of delicacy, and from a wish to avoid exposing himself to the gentle-

man who drew his will, and who was at the time agent to Lady *Caroline Damer* ; and that she (*Ann Bridge*) had promised her husband *George Bridge*, that she would see that the legacy was paid to *Mary Bridge*, otherwise *Mary Hillditch*.

1829.
NEATHWAY
v.
HAM.

The same witness further proved, that upon several subsequent occasions *Ann Bridge* mentioned to him the subject of the bequest to *Mary Bridge*, otherwise *Mary Hillditch*, and sometimes asked deponent whether she ought to pay it, as the legatee's name was not *Bridge* but *Hillditch* ; upon which he uniformly told her that as she had promised her husband *George Bridge*, that she would see the legacy paid, she ought to pay it.

Several other witnesses deposed, that *Mary Hillditch* went by the name of *Bridge*, and was delivered of a female child, of which the testator was the father, but that her real name was *Mary Hillditch*.

Mr. Bickersteth.

George Bridge by his will gave *Mary Bridge* 200*l.* ; he appointed his wife executrix ; she died in 1824, and by her will gave *Mary Hillditch* 100*l.* The bill alleges that the two names represented the same person, she being a fellow-servant of the testator in the service of Lord *Dorchester*, and having been pregnant by him. That this is the same person there is evidence before the Court.

Ann Bridge, being the personal representative, her declaration was evidence.

Mr. Russell for the executor of the executrix.

This claim is brought forward after the death of the executrix, *Mary Hillditch* never having demanded it;

1829.
NEATHWAY
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and now the legacy is claimed by an administrator of *Mary Hilditch*. The Plaintiff must first shew by evidence that at the date of the will there was no such person as the testator's cousin *Mary Bridge*.

The MASTER of the ROLLS.

I will give you the common enquiry, Who was the person meant by "*Mary Bridge* my cousin" in the will of *George Bridge*? But I think it is an idle enquiry. There can be no doubt on the evidence that she is the person called *Mary Hilditch*.

There must be a decree for payment of the 100*l.* given to *Mary Hilditch* by *Ann Bridge*.

The evidence in the cause may be read before the Master.

Mr. *Russell* objected to the admission of *Ann Bridge* being read.

The MASTER of the ROLLS.

It was an admission against her own interest. You may make what use of the objection you can before the Master.

Reg. Lib. B. 1829. fol. 2015.

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ROBERT NICHOLSON, being seised of freehold and copyhold estates, made his will on the 30th of April 1817, and thereby confirmed an annuity of 500*l.* a-year given to his wife by a settlement on their marriage, and also gave her an additional annuity of 500*l.* and a legacy of 1000*l.*, and all his household goods, coaches, china, books, and wine; and he gave unto *Elizabeth Nicholson*, the widow of his late father, 500*l.* a-year during widowhood, and confirmed to her an annuity of 500*l.* (given by his father during her widowhood) during her life, notwithstanding she should marry again; and he declared that the provision made by his will for his wife was in bar of her dower and thirds at common law, and all other claims by law or custom upon his real or personal estate: and he gave, devised, and bequeathed all and singular his freehold, copyhold, and leasehold messuages, lands, hereditaments, and real estate, and all his personal estate and effects, unto trustees to sell the real estate, and to convert the personal estate into money,

Copyholds and Customary Estates.

In two manors in *Durham* there is no custom for surrendering to the uses of the will, but the tenant divests himself of the legal estate, and by surrender vests it in a trustee, who subscribes a memorandum or defeazance, that the surrender is to the uses of the surrenderor's will. In this case the father and maternal grandfather of

the testator *R. N.* being both copyholders, had respectively caused their copyhold tenements to be surrendered to the other, who had subscribed the usual defeazance. The legal estate in both descended to the testator. But with regard to the tenements in the manor of *Houghton*, they were devised by the father of the testator to trustees, to the intent that his widow might receive an annuity thereout, and subject thereto to the testator *R. N.* in fee. The widow being alive at the time the testator *R. N.* made his will, and died, it was held, that the copyholds in the manor of *Houghton* passed by his will.

With respect to the tenements which were in the other manor, the testator's maternal grandfather, who had the beneficial interest in them, devised them unto trustees, upon trust for the testator *R. N.*: Held, that there being nothing to separate the legal estate and equitable interest, the equitable interest had merged in the legal estate in the testator, and could not be devised by him according to the custom of the manor: Held, that his widow was entitled to free bench, and the heir, subject thereto, to the inheritance, but they taking benefits under the will, were bound to elect.

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and out of the monies, the produce of his real and personal estate, to pay his debts, funeral expenses, and legacies, and to invest and apply the surplus in payment of portions to his younger sons and daughters, and, subject thereto, to apply it to the maintenance of his eldest son until he attained twenty-one, and then to transfer the principal to him.

The testator died, leaving *Margaret Nicholson* his widow, two sons and two daughters.

A supplemental bill in this cause set forth the history of the copyholds as follows: — That on the 30th of *May* 1780, lands in the manor of *Houghton* in the county of *Durham* were surrendered to *Thomas Simpson* a grandfather of the testator, his heirs and sequels, in right according to the custom of the manor, and *Thomas Simpson* was thereupon admitted tenant of the hereditaments. A defeazance was subscribed that the hereditaments were so surrendered upon such trusts as *Thomas Nicholson* the elder, who had purchased the same, should limit, devise, declare, and appoint; and in default thereof, in trust for *Thomas Nicholson* the elder and sequels in right.

A similar surrender of another property in the same manor to *Thomas Simpson* in trust for *Thomas Nicholson* was made on the 17th of *November* 1769. *Thomas Simpson* had two daughters; one of them, *Eleanor*, married *Thomas Nicholson* the elder, but she died in her father's lifetime. *Thomas Simpson* died in the month of *August* 1802, leaving *Thomas Nicholson* the younger, *Robert Nicholson* the testator, and two others, his grandchildren by his daughter *Eleanor*, and also leaving a daughter *Elizabeth*. This daughter *Elizabeth* and *Thomas Nicholson* the younger were, of course, the co-heirs of

Thomas Simpson, and they were also his co-heirs according to the custom of the manor of *Houghton*. *Thomas Nicholson* the younger, and *Elizabeth Simpson* both died, leaving the testator their heir-at-law, and heir according to the custom; so that the whole legal estate of the copyhold became vested in the testator *Robert Nicholson*.

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Thomas Nicholson the elder, by his will dated 14th *January* 1811, gave all his lands in *Houghton*, &c. and all other his freehold and copyhold messuages and hereditaments unto *John Goodchild* and *Christopher Bramwell*, their heirs and assigns, to the intent, that *Elizabeth* his second wife might, during her life, in case she should so long continue unmarried, have and take an annuity of 500*l.* out of the said hereditaments; and in the event of her second marriage, that she might have and take an annuity of 200*l.*; and subject thereto to the use of the Plaintiff *Robert Nicholson* the elder, his heirs and assigns for ever.

Thomas Nicholson the elder died on the 26th of *January* 1811.

On the 14th of *November* 1782, two other surrenders of lands in the manor of *Easington* in *Durham* were made to *Mary Simpson* and *Thomas Nicholson* the elder; they were admitted tenants, with a defeazance that it was to such uses as *Thomas Simpson* should by will appoint.

Thomas Nicholson the elder survived *Mary Simpson*; and upon the death of the former, he left *Robert Nicholson* his eldest son and heir-at-law, in whom the legal estate in the last-mentioned lands became vested.

Thomas Simpson by his will dated the 24th day of *February* 1802, after giving an annuity of 30*l.* a-year

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to his servant during her life, and several pecuniary legacies, gave all his messuages, hereditaments, and real estate of whatsoever tenure unto *Thomas Nicholson* the elder and *Quintin Blackburn*, and their heirs, upon trust, in the event which happened, for his grandson *Robert Nicholson* the elder, his heirs and assigns for ever; and the testator thereby charged in the first place his personal estate, and in the next place his real estate, so far as any deficiency should happen, with the payment of all his just debts, legacies, annuities, and funeral expenses.

Quintin Blackburn survived *Thomas Nicholson* the elder.

The steward of the manor of *Houghton* gave a certificate as follows : —

“ I, the undersigned, do certify, that I have for forty years last past been, and now am, the acting deputy-steward as well of the manor of *Houghton*, as of the several other manors of and belonging to the see of *Durham* in the county of *Durham*, and am well acquainted with the customs thereof as to the copyholds in or within, or held of the said several manors, such customs being similar in all and each of the same manors: that by the customs of the said manors a copyhold tenement, that is, the legal estate, being vested in the owner thereof, was not, previous to the act of 55 G. 3. c. 192. devisable by the owner or tenant so seised thereof by his will: that when any such copyholder died seised, that is, of the legal estate, his widow is, by the custom of the manor, entitled to the whole tenement for her life in her widow right and as her free bench, subject to which widow right and free bench, the copyhold tenement descends to the heir as at the common law: that in

order to enable the copyholder or owner so seised to devise his copyhold by will, it is and has been usual for him to divest himself of the legal estate by surrendering the tenement, or otherwise having it vested in a trustee, (who is thereupon admitted, and is the lord's tenant,) and his sequels in right, with a memorandum or defeazance subscribed to the surrender, declaring that the premises are thereby so surrendered upon such trusts as the surrenderor, or the person having or entitled to the equitable or beneficial interest, shall by will appoint; and in default thereof, in trust for him, his heirs, sequels in right, and assigns. But it is understood in practice, that without any particular previous surrender being passed for such purpose, the owner of the same equitable estate, (the legal estate being vested in a trustee,) may devise by will such his equitable estate."

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The Master found to the effect of this certificate; and that without any particular previous surrender for the purpose, the owner of a mere equitable estate in a copyhold tenement, the legal estate being vested in another person, may, according to the custom of the manor, devise by will such equitable estate.

The steward sent a similar certificate in respect of the manor of *Easington*, and the Master found according to it.

The Master also found, that the premises were of copyhold tenure, and held by copy of court roll.

Robert Nicholson the elder died, and left the Defendant *Margaret Nicholson* his widow, and *Robert Nicholson* the younger his heir-at-law, and customary heir, an infant; and the legal estate in the said copyhold hereditaments became vested in him.

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Margaret Nicholson alleged, that she was entitled to her free bench.

Mr. Bickersteth. Upon the will of *Robert Nicholson* the elder two questions arise; first, whether the copyholds pass by his will? if they did not pass, the widow would be entitled to her free bench for life, and then they will go to the eldest son; and if they did not pass, the question is, whether the son shall not be put to his election?

Thomas Nicholson being entitled to the equitable estate, devised it to trustees, their heirs and assigns, to the intent that his widow should receive an annuity for her life; she is now living: there is, therefore, an estate in the trustees and their heirs for the purpose of this annuity; and so long as that annuity subsists, there is a separation of the legal and equitable estate.

He subjected all the estates to the payment of his debts, which constituted a charge in the hands of the trustees. The copyhold estates did pass by the will of *Robert Nicholson*, and if they did not, the widow and eldest son must elect. Those copyhold estates, with other lands, the trustees were directed to sell: the eldest son cannot participate in the benefit of the sales unless he elect to confirm the will. The testator has devised his copyholds generally; but we have evidence that he did intend to devise these particular copyholds. The general expression "all my copyholds" is sufficient. *Blunt v. Clitheroe* (a); *Strutt v. Finch*, before Sir J. Leach, Vice-Chancellor (b); *Oxenforth v. Cawkwell* (c); *Wentworth v. Cox*. (d)

(a) 10 Ves. 589.

(b) 2 Sim. & Stew. 229.

(c) 2 Sim. & Stew. 558.

(d) 6 Mad. 363.

Mr. *Preston* for the heir at law and the widow.

The equitable estate must be extinguished in the legal. The cases are collected in the book on *Merger*, 327. It was decided in the case of *Goodright, Lessee of Alston, v. Wells and Others* (a), in favour of the person who had the legal estate. I must admit the question of election arises, *Hewlet v. Wilks* (b); but I do not admit it as to all the testator's copyholds; and I must take leave to say, that the cases cited from 10 *Ves.* and elsewhere, go beyond the law. I do not mean to say, that if the Court sees it to be clear that copyhold lands not surrendered were intended to pass by the will, this Court has not power to give effect to it.

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Mr. *Jacob* with Mr. *Preston*. The copyhold in *Houghton* was vested in the testator; the equitable estate was governed by the will of *Thomas Nicholson*; *Robert Nicholson* was entitled, subject to the annuity given by that will: and it has been made a question, whether the annuitant and the trustees had a legal estate interposed? But we contend that it did not prevent the union. In *Wade v. Pagett* (c), Lord *Thurlow* held, that where the estates unite the equitable estate must merge in the legal. In *Philips v. Bridges* (d) it was held, that a merger did not take place; but there the equitable estate was in tail.

With respect to the copyhold in the manor of *Easington*, the case is more clear, there being no devise to trustees, but only a mere charge of debts—the testator was not in a situation to devise. The next question is, whether the infant heir is bound to elect?

(a) *Douglas*, 771.

(b) *Ambler*, 430.

(c) 1 *Brown*, 364.

(d) 3 *Ves.* 126.

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and that depends upon this, whether the Court finds an intention in the testator that the copyholds should pass? I cannot dispute that he did so intend as to the copyholds in *Houghton*; but as to the estate in *Easington*, there is no means of collecting the intention, and the words of the testator are otherwise satisfied.

The grants are not at the will of the lord, but the Master has found that they are copyholds; and so they are to a certain extent, but they are commonly designated customary property,—they are *not* in their nature devisable. The customs of the manor did not admit of a surrender to the uses of a will; but the mode was to surrender the estate to a trustee, who subscribed a defeazance that he would hold to the use of the will. And the Court will consider the question, whether the expression “all copyholds” can extend to customary estates not devisable? And upon the same principle the Court may be told, that the words “all my copyholds” apply to customary estates mentioned; but not to all, there being sufficient otherwise to answer the words of the will. With respect to the widow, she must elect.

The MASTER of the ROLLS.

I am of opinion that it is a good devise as regards the *Houghton* estate; but with respect to the *Easington* lands it must be referred to the Master to enquire, whether it will be for the interest of the widow and infant to elect.

Declare, that the Defendant *Robert Nicholson*, the heir-at-law of *Robert Nicholson* the testator, was trustee of the legal estate in the copyhold estates held of the manor of *Houghton* for the devisees in trust under the will of *Robert Nicholson* the elder, the testator; and that

the equitable interest therein was vested in them on the trusts of the will.

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That the copyhold estates held of the manor of *Easington* did not pass by the will of *Robert Nicholson*, and that *Robert Nicholson* the heir-at-law was entitled thereto, subject to the free bench of *Margaret Hamond*, late *Margaret Nicholson*, the widow of the testator *Robert Nicholson*.

That the heir-at-law and widow ought to elect; and that the Master inquire and report, whether it will be for their interest to elect to take under or against the will of *Robert Nicholson*.

The Master reported, that it was for their interest that they should elect; and that, subject to the debts and charges by the will of *Robert Nicholson* the elder, the heir-at-law was entitled to the monies which had arisen from the sale of the real and personal estate on his attaining twenty-one.

This cause came on as a short cause, when the counsel for the widow and infant heir elected to take under the will agreeably to the Master's report.

July 2.

Reg. Lib. B. 1829. fol. 609.

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ROLLS.

Thursday,
January 28.

ROBERT LYNN, and ELIZABETH his Wife,
WILLIAM LYNN, and WILLIAM BEWICK
LYNN, - - - Plaintiffs;

AND

JOSEPH ASHTON, - - Defendant.

*Settlement.**Appointment.**Feme Covert.*

Stock settled on marriage to the separate use of the intended wife, and afterwards as she shall appoint. She assigned her life-interest to two persons for certain purposes, and appointed the capital to the same purposes.

Decreed, that the trustees transfer the stock accordingly.

BY an indenture of settlement made previously to the marriage of the Plaintiffs *Robert Lynn* and *Elizabeth Lynn*, dated 28th February 1797, between the Plaintiff *Robert Lynn*, of the first part, the Plaintiff *Elizabeth Lynn*, (then *Elizabeth Cannon*, spinster,) of the second part, and the Plaintiff *William Lynn*, and *William Green*, of the third part. It was witnessed, that *William Lynn* and *William Green*, or the survivor of them, or the trustees or trustee for the time being, in their or his stead, should stand possessed of a sum of 650*l.* of 3 per cent. consols (which had been previously transferred into the names of *William Lynn* and *George Green*), and all the dividends and interest then due, or to become due thereon, and all money to be received on account of such debts and sums of money as were due or belonging to *Elizabeth Lynn* prior to the marriage, (and which debts and money were by the now stating indenture assigned by *Elizabeth Lynn* to *William Lynn* and *William Green*, their executors, administrators, and assigns,) after the solemnization of the intended marriage, upon trust for the sole and separate use of *Elizabeth Lynn*, her executors, administrators and assigns, notwithstanding her coverture, and that the trustees should permit *Elizabeth Lynn* to receive all the said trust monies, and the dividends, interest, savings, and accumulations thereof, for and during her natural life, for her own use, and notwith-

standing her then intended coverture, and after her death, upon trust for such uses, ends, intents, and purposes, as *Elizabeth Lynn* should, notwithstanding her then intended coverture, by any deed or writing to be by her duly executed, order, give, declare, direct, or appoint, and in case of no such order, gift, direction, declaration, or appointment, for her children, and in default of children, for her next of kin.

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Various sums of money were from time to time received by the trustees for the time being, on account of the debts and sums of money assigned by or comprised in the settlement; and the 650*l.* 3 per cent. consols. was, by the investment of the said debts and sums of money, increased to the sum of 1400*l.*

The Defendant *Ashton* was afterwards appointed trustee instead of *Green*, and the 1400*l.* was transferred into the names of him and the Plaintiff, *William Lynn*.

By an indenture dated 23d *June* 1827, between *Robert Lynn* and *Elizabeth* his wife, of the one part, and *William Lynn* and *William Bewick Lynn*, of the other part, after reciting as before stated, and that the Plaintiff *Elizabeth Lynn* was desirous (with the privity of *Robert Lynn*), of assigning her life-interest in the dividends of the 1400*l.* 3 per cent. consols to *William Lynn* and *W. B. Lynn*, their executors, administrators, and assigns, and also of appointing the principal thereof, after her death, unto the last-mentioned Plaintiffs, their executors, administrators, and assigns, to the intent, that they might cause the 1400*l.* 3 per cent. consols to be transferred into their names, and that they might afterwards transfer the sum of 1200*l.*, part of the same, in the manner necessary for obtaining in lieu thereof a government annuity for the lives of the Plaintiffs *Robert* and *Elizabeth*

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his wife, and the life of the survivor, and might retain the residue of the 1400*l.* stock for the purposes therein after mentioned; it was witnessed, that *Elizabeth Lynn*, for the nominal consideration therein mentioned, bargained, sold, assigned, transferred, and set over, all her life-interest in the sum of 1400*l.*, 3 per cent. consols, to *William Lynn* and *W.B. Lynn*, their executors, administrators, and assigns, to hold unto the last-mentioned Plaintiffs, their executors, administrators, and assigns; and it was further witnessed, that for the nominal consideration therein mentioned, the Plaintiff *Elizabeth Lynn*, with the privity and approbation of the Plaintiff *Robert Lynn*, did by that deed or writing, by her duly executed, order, give, declare, direct, and appoint that the 1400*l.* 3 per cent. consols should, after the death of *Elizabeth Lynn*, go and belong to *William Lynn* and *William B. Lynn*, their executors, administrators, and assigns; and it was thereby agreed and declared between them, and by the parties thereto, that *William Lynn* and *W. B. Lynn*, and the survivor of them, or the executors or administrators of such survivor, should, with all convenient speed after the execution thereof, procure the sum of 1400*l.* 3 per cent. consols to be transferred into the names of *William Lynn* and *W. B. Lynn*, or the survivor of them, or the executors or administrators of such survivor, for the purpose of obtaining, with all convenient speed, with 1200*l.*, part of the 1400*l.* stock, such government annuity as aforesaid, and upon trust as to the 200*l.* residue of the 1400*l.* stock, to or for the use or benefit of *Robert Lynn* and *Elizabeth* his wife, in the manner therein particularly mentioned.

The bill stated the preceding facts, and that the Defendant, the trustee, refused to join in transferring the 1400*l.* 3 per cent. consols; and prayed, that he might be compelled to join the Plaintiff *William Lynn*

in transferring the said sum of 1400*l.* 3 per cent. consols into the names of *William Lynn* and *William Bewick Lynn*, upon the trusts thereof declared in and by the indenture of the 23d *June* 1827.

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Mr. *Pemberton* and Mr. *Purvis*, for the Plaintiffs.

Mr. *James*, for the Defendant.

The MASTER of the ROLLS. This assignment defeats the intention, and gives an interest totally inconsistent with the intention: there certainly is no other person who has an interest. The trustees acquire by her assignment the life-estate, and by the appointment the remainder over; there is no breach of trust.

Decreed as prayed, and the costs to be paid out of the fund.

Reg. Lib. B. 1829. fol. 567.

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BETWEEN

WESTMINSTER HALL. GEORGE PRITCHARD, - Plaintiff;

January 28.

AND

CARTER DRAPER and Sir THOMAS MARYON
WILSON, Bart., - - Defendants.

Partnership. **T**HE Plaintiff and the Defendant *Draper* were co-partners in the business of attorneys and solicitors, and the Defendant *Wilson* was one of their clients.

Debts due to a dissolved partnership.

Costs.

Payment by a client to one of two partners, after the partnership has been dissolved, is a good payment. If the debtor permits one of such partners to receive monies in the confidence that those monies will be a satisfaction of the partnership debt, the retainer of those monies is equivalent to an actual payment.

The partnership was dissolved in *October 1817*. This bill was filed by the Plaintiff, to have an account of what was due from the Defendant *Wilson* to the co-partnership; but before the Defendant *Wilson* had put in an answer he died,—the suit was then revived against his executors. The cause came on to be heard on the *16th July 1827*, before Lord *Gifford*, Master of the Rolls, when his Honour decreed that it be referred to the Master in rotation to tax the bill of fees, charges, and disbursements of *George Pritchard* and *Carter Draper*; and that the Master should take an account of what, if any thing, was due and owing from the estate of *Sir Thomas Maryon Wilson* deceased, in respect of the said bill of fees, charges, and disbursements; and the Master was to be at liberty to state any special circumstances that might arise at the request of either party.

The Master by his report, dated *11th November 1828*, reported that he had taxed the bill of fees, charges, and disbursements of *George Pritchard* and *Carter Draper*, at the sum of *768l. 15s. 8d.* And for the purpose of taking the account of what, if any thing, was due and owing from the estate of *Sir Thomas Maryon Wilson*, he

had caused the Defendant *Draper* to be examined on interrogatories; and he found by a claim laid before him on behalf of the Defendants, which had been duly vouched by the production of proper vouchers before him, that Sir *Thomas Maryon Wilson* paid to the Defendant *Draper*, on account of the said bill of fees, charges, and disbursements, several sums of money, amounting together to the sum of 326*l.* 9*s.*, which being deducted from the sum of 768*l.* 15*s.* 8*d.*, the same was reduced to the sum of 442*l.* 6*s.* 8*d.*, which he found to be due and owing from the estate of *Wilson*, in respect of the said bill.

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But being at liberty to state special circumstances, at the request of either party, he submitted to the Court, at the request of the Defendants, the executors of *Wilson*, the following circumstances:—

In and previous to the year 1814 the Defendant *Draper* was the solicitor of Sir *Thomas Maryon Wilson*. In that year the Plaintiff and the Defendant *Draper* entered into co-partnership as solicitors, and continued in such copartnership until *October* 1817, when the same was dissolved. During the continuance of the co-partnership, Sir *Thomas Maryon Wilson* employed the Plaintiff and the Defendant *Draper* as his solicitors; and Sir *Thomas Maryon Wilson* was aware of the dissolution shortly after the time thereof. On the 25th of *July* 1818, a joint bill of costs was delivered by *Draper* to Sir *Thomas Maryon Wilson*, the amount of which bill was 867*l.* 5*s.* 5*d.*, including a sum of 67*l.* 17*s.* 5*d.* as the balance of a former bill of the copartnership; and the bill was accompanied by a letter, dated 25th *July* 1818, as follows:—

“ Dear Sir,—At length I am enabled to send you my accounts, which are three in number: the first is

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due to *Pritchard and Draper*, of 867*l.* 5*s.* 5*d.*, from which, I believe, there have been received the several sums of 50*l.*, 26*l.* 9*s.*, 28*l.*, and 300*l.* The second is also due to *Pritchard and Draper*, and is the separate account of the parish of *Fletching*. The third account is owing to *Draper and Bird*, wherein I have given you credit for the money received from *Furness* for rent. At the bottom of the first bill I have not put the receipts, on account, lest by any means I have made a mistake; but I am not conscious of having so done.

“ I remain, dear sir,

“ Most respectfully yours,

“ CARTER DRAPER.

“ Sir *Thomas Maryon Wilson*, Bart.”

In a letter by the Plaintiff to the Defendant *Draper*, bearing date 27th *October* 1818, the Plaintiff uses the following expression: “ Will *Sir T. M. W.* soon settle?” And it was admitted that Sir *Thomas Maryon Wilson* was the person alluded to by the letters *Sir T. M. W.*; and that the Plaintiff *George Pritchard* knew and was well aware that Sir *Thomas Maryon Wilson* continued to employ the Defendant *Draper* as his solicitor after the dissolution of partnership. On the 17th day of *February* 1821, the Plaintiff gave a notice to the solicitor for Sir *Thomas Maryon Wilson* not to pay *Draper* the balance of any bill or bills delivered in by him as due from Sir *Thomas Maryon Wilson* to the late firm of Messrs. *Pritchard and Draper*. On the 22d of *February* 1821 the Plaintiff and the Defendant *Draper* signed an agreement, by which the Defendant *Draper* agreed to give the Plaintiff his bond for securing 750*l.* payable by instalments; and to assign to the Plaintiff the debts contracted during the partnership, and which then remained outstanding and due to the said firm of “ *Pritchard and Draper*,” and the Defendant *Draper* undertook within one month to supply the Plaintiff with a list of the debts

then still remaining outstanding and unpaid to the said co-partnership firm of "*Pritchard and Draper*;" but it did not appear before the Master that such list had been supplied.

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On the 22d of *February* 1821 the Plaintiff delivered a copy of such agreement to the solicitors for Sir *Thomas Maryon Wilson*; and the Plaintiff, on the 28th of *February* 1821, wrote and sent the letter to Sir *Thomas Maryon Wilson* in the bill mentioned explanatory of such notice: that after the dissolution of co-partnership the Defendant *Draper* continued to act as solicitor and receiver of rents of estates of Sir *Thomas Maryon Wilson*, and continued so to act until *September* 1820: that on the 22d of *February* 1821, Sir *Thomas Maryon Wilson* filed his bill in this Court against *Draper* as his late attorney and solicitor, and agent and receiver, for an account; and that the Defendants, *William Nottidge* and *Richard Black*, with *John Stride* now deceased, as executors of Sir *Thomas Maryon Wilson*, filed a bill of revivor of such suit against the Defendant *Draper*, and such suit was still pending.

That the Plaintiff had examined the Defendant *Draper* as a party in this cause upon interrogatories; and he found by his examination put in thereto that the Defendant *Draper* stated that he did not, since the dissolution of the partnership, settle and adjust any account with Sir *Thomas Maryon Wilson* deceased, nor did Sir *Thomas Maryon Wilson* ever adjust or agree with the examinant upon any account or accounts in which credit or credits was or were given to him for any sums of money as having been paid to the examinant expressly for or on account of any bill of costs, or for monies retained by the examinant expressly for or on account, or in satisfaction, or part satisfaction, of any bill of costs;

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nor did Sir *Thomas Maryon Wilson*, to the knowledge and belief of the examinant, ever debit the examinant with any sum or sums of money expressly on account of any bill of costs. And the examinant stated that Sir *Thomas Maryon Wilson* did not ever in writing, or in any account in writing, expressly allow to the examinant any sum or sums of money expressly in payment and satisfaction, or in part payment or satisfaction, of any account; and the examinant stated that his accounts with Sir *Thomas Maryon Wilson* had not been settled.

And the Defendants, the executors, had also examined the Defendant *Draper* as a party in this cause upon interrogatories; and by his examination he stated that he did receive from, and was paid by, Sir *Thomas Maryon Wilson*, Baronet, deceased, in manner thereafter mentioned, the whole amount of the bill of costs of the late partnership between the examinant and the Plaintiff due from Sir *Thomas Maryon Wilson* at the time of the dissolution of the partnership. And the examinant stated that the bill of costs was paid, or he received the amount thereof at various times and by various sums of money, some of which sums were paid to the examinant by Sir *Thomas Maryon Wilson*, and others of them by monies retained by the examinant by the direction, or with the permission, of Sir *Thomas Maryon Wilson*, out of monies belonging to him which had been received by the examinant: and the examinant stated that, to the best of his recollection and belief, there was not any person present when such monies, or any of them, were paid to the examinant, or when Sir *Thomas Maryon Wilson* directed or permitted the examinant to retain such monies as the examinant did retain: and the examinant stated, that he had in the schedule to his examination underwritten set forth a true statement or account, to the best of his belief, of the monies which

the examinant so received from Sir *Thomas Maryon Wilson* or retained; but he did not recollect or believe, that such monies, or any part of them, were retained by the examinant expressly on account of such bill of costs; for when he had money in his hands, Sir *Thomas Maryon Wilson* told the examinant to retain what he wanted, as money would be of service to him (the examinant); and the examinant stated, that he accordingly retained the monies in the said schedule mentioned. That to the best of his belief there was not any money due from the estate of Sir *Thomas Maryon Wilson* deceased, on account of the bill of costs of the late partnership: and the examinant stated, that the said bill of costs was, in fact, paid and settled on the 10th of *September* 1820, when the sum of 282*l.* 17*s.* 5*d.* was retained by the examinant: and the examinant stated, that he did not recollect that any thing particular passed on the occasion; but it was of course understood by him, and he believed by Sir *Thomas Maryon Wilson* also, that credit was to be given by the examinant in his accounts with Sir *Thomas Maryon Wilson* for the sums so paid to and retained by the examinant, when the account should at a future time be settled between the examinant and Sir *Thomas Maryon Wilson*; and for that reason also, the examinant stated that he did not make or give, or was not required to make or give, any receipts or receipt for the monies which were so paid to, or retained by, the examinant as aforesaid.

1830.
 PRITCHARD
 v.
 DRAFER.

The cause now came on to be heard upon further directions.

Mr. *Treslove*, and Mr. *Oliver Anderdon*, for the Plaintiff. The Master has found that there is a debt of 442*l.* due to the firm, and the Master's finding was correct. There is no pretence for saying that there was

1830.
 PRITCHARD
 v.
 DRAPER.

ever a payment of the partnership debt to one of the partners. *Draper* had no authority to apply the money received by him in his private character in discharge of the partnership debt; and if *Wilson* had brought an action against *Draper* as his receiver, the latter could not have insisted upon such an application, or have pleaded the partnership debt by way of set-off. *Todd v. Reed* (a) will illustrate this view. In the case of *Jeffs v. Wood* (b): the then Master of the Rolls held that stoppage was no payment at law, nor was it of itself payment in equity.

Mr. Pemberton, for the executors of *Sir Thomas Wilson*. The question is, whether, upon the evidence found by the Master, he ought not to have reported that the debt was satisfied? With respect to the evidence of *Draper* —

Mr. O. Anderdon. He is not examined as a witness, but as a party.

Mr. Pemberton. The accounts remained in the possession of *Mr. Draper*, for him to wind them up. *Mr. Pritchard* did very little towards them. *Mr. P.* asks, in a letter twelve months afterwards, Will *Sir Thomas Wilson* settle the account? *Mr. Draper* had been employed by *Sir Thomas Wilson* before the partnership, and continued to be so employed during the partnership. Had not *Sir Thomas Wilson* a right to treat *Mr. Draper* as before? *Mr. Draper* goes on receiving *Sir Thomas Wilson's* rents, and that *Mr. Pritchard* considered that *Sir Thomas Wilson* had a right to pay *Draper* is to be concluded by that. *Mr. Pritchard* actually gave *Sir Thomas*, in 1821, notice not to pay *Draper*. Up to that time these payments to him were not disputed; but now finding *Draper* to be insolvent, he attempts to get all the partnership bills from *Sir Thomas Wilson*: the whole question between these parties might have been tried at law.

(a) 4 B. & A. 210.

(b) 2 P. W. 129.

BEFORE THE MASTER OF THE ROLLS.

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Mr. *Cooper* (also for the executors, having handed in a receipt dated on the 7th *October* 1817,) the partnership was dissolved on the 17th *October*, and that document shews that 800*l.* was received during the partnership: it is signed "For *Pritchard* and Self, *C. Draper*." The Court can never come to a conclusion that this money must be again paid. In 1821 *Draper* assigned to *Pritchard* the outstanding debts; and it was agreed that a list of them should be made out, but it never was made out: however, there is no doubt that if a payment is made to one of two partners, after notice from the other not to do so, that would be a payment in the parties' own wrong.

1820.
PRITCHARD
&
DRAPER

The MASTER of the ROLLS. *Pritchard* had a demand upon his partner, and that demand is satisfied by an assignment of debts, and a bond for 750*l.*, and to know that that would have been satisfaction of his demand upon his partner, he must have calculated what was due to him: it is impossible that that sum of 750*l.* could have been secured without reference to what was due.

Mr. *Cooper* continued: —

Before the Master I cited authorities that payment to one of two partners was a good payment, and I proved that all the demand had been paid before the notice of 1821, and that two payments had been made during the partnership; but the Master has reported against us. From the examination of Mr. *Draper* it appears that the debt was satisfied in 1820.

Mr. *Treslove*, in reply.

The bill alleges that *Draper* refused to join in an action at law, and that is proved: at law we must have been nonsuited. The receipt for 800*l.* was given on the 7th *October* 1817, but the Defendant *Wilson* does not

1890.
 PRITCHARD
 v.
 DRAPER.

pretend to have receipts for the other sums. In *October* 1818 *Pritchard* says to *Draper*, "Will *Sir Thomas Wilson* soon settle?" It was very proper to apply to him, he having been concerned for *Sir Thomas Wilson*; but the question remains, whether payments have been made. *Draper* in his examination, says that he never received any monies specifically in payment of the partnership bills, but he received rents. To this hour we do not know the state of the account; and on our notice to *Sir Thomas Wilson* he immediately filed a bill against *Draper* for an account.

The MASTER of the ROLLS. If the case made by the bill had been established by the Master's report, there could have been no doubt that the finding of the Master would have been perfectly consistent with the law upon such cases; but it so happens that the case made by the Master's report is totally different from the case made upon the bill. In the bill it is stated, that after the dissolution of the partnership, and after an assignment by *Draper* to his partner *Pritchard* of all the partnership debts, and after notice to *Sir Thomas Wilson* of that assignment, he *Sir Thomas Wilson* paid to *Draper* the partnership debt. Now it appears that the payment insisted on upon the part of *Sir Thomas Wilson*, or rather upon the part of his executor, he being dead, was a payment due after the dissolution of the partnership, but prior to the assignment made by *Draper* to *Pritchard*, and prior, consequently, to any notice of that assignment given to *Sir Thomas Wilson*. It is perfectly clear, after a dissolution of partnership, unless there be notice to the debtors of the partnership that partnership debts are to be paid to a particular partner, payment by a debtor to any one partner is a good satisfaction of the partnership debt. If the debtor in the place of payment permits one of the partners — gives him authority to

receive monies which are due to him, the debtor, in the confidence that those monies when received will (like payment by the debtor) be a satisfaction of the partnership debt, there can be no doubt that a retainer of those monies by a partner receiving them is equivalent to actual payment by the debtor to the partnership. It must be assumed here, that Sir *Thomas Wilson* gave authority to *Draper* to receive monies due to him, in the confidence that those monies, when received, were to be considered as payments of the partnership debt. I am of opinion, therefore, that the Master has mistaken the law, that his report is incorrect, and cannot be sustained.

Bill dismissed with costs up to the hearing, but
no subsequent costs.

Reg. Lib. B. 1829. fol. 1269.

1830.
PRITCHARD
v.
DRAPER.

HODDER v. RUFFIN.

WESTMINSTER
HALL.
January 29.

UNDER a decree for sale in this cause in 1806, Mr. *John Simmons*, in 1808, purchased lot 36. at the sum of 1020*l.* on behalf of a Mr. *Thomas Milton*. Two of the Plaintiffs employed *George Hiffey* to open the biddings at 1200*l.*, which he did, and the Court ordered him to pay 300*l.* into court by way of deposit, which was accordingly done. At the next sale no person offered beyond the 1200*l.* On the 31st of *December* 1808 *Richard Martin*, one of those two Plaintiffs, agreed with *William Alston* that the latter should be considered the purchaser, and he accordingly repaid them the 300*l.* Subsequently *Alston* verbally agreed with *William Hills* that the latter should take the purchase off his hands. In *June* 1813 Messrs. C——, the Plaintiff's solicitors, wrote *Alston* to remit them the remaining 900*l.*,

*Vendor and
Purchaser.*

A purchaser in this court having resold with a profit before his purchase was confirmed, the person to whom he has sold is to be considered as a substituted purchaser, and must pay the additional purchase money into Court for the benefit of the parties to the suit.

1830.

HILLS

v.

MESSRS. C.

that they might pay it into court; and he having communicated it to *Hills*, the latter remitted the 900*l.* to the Messrs. C——. In 1813, *Hills* paid to *Alston* the sum of 600*l.*, of which 300*l.* was the deposit, and the remaining 300*l.* for interest thereon and as a profit. (a) Messrs. C—— did not pay the 900*l.* into court; but on the 2d of May 1818 obtained the Master's report, which found that *Hiffey* made the advance as agent to *William Alston*. By a subsequent report, the Master found that the Messrs. C—— received the 900*l.* in part performance of the contract of purchase of the said *William Alston*, and at his request and by his direction, and for the purpose of being paid into court by them as solicitors to the Plaintiffs; and that they had not then been in any manner employed by the said *William Hills* as his attorney and solicitor, or otherwise.

Mrs. *Burdett*, the purchaser of another lot, claimed a right of passage, and brought an action, wherein the damages and costs amounted to 110*l.*, which was paid by the Messrs. C——. The balance due to *Hills* on the 900*l.* sent to C—— had been paid to him.

The Master found, that the 900*l.* would have purchased 1590*l.* 3 per cent. Bank annuities, and that the dividends thereon amounted to 725*l.*, both which sums the Court ordered Messrs. C—— to pay, but they had gone out of the jurisdiction of the Court. The Master found an admission by *William Hills* that the Messrs. C—— had repaid him the 900*l.* and interest. The petition prayed, that *Alston* or *Hills* might be declared the purchaser; and that they, or one of them, might transfer to the Accountant-General 1590*l.* 3 per cent. stock, and pay into the Bank 725*l.*

(a) So that *Hill* had to pay 1800*l.* altogether for the purchase, being 300*l.* more than the price offered at the sale by the Court.

cash for dividends down to *July* 1828, and all subsequent dividends.

1830.

HODDER
v.
RUFFIN.

Mr. *Tinney* and Mr. *Wray*, for the petitioners.

Mr. *Ching*, for *Hills*.

Mr. *Kindersley*, for the purchaser.

• *The MASTER of the ROLLS.*

In this case the order was not even confirmed when the 300*l.* profit of the re-sale was made. The Court never confirms an order where the purchaser has made a profit, unless he bring the profit he has made into Court. I can only look at *Hills* and *Alston*, the one as a purchaser, the other as a substituted purchaser; but neither of them have been confirmed by the Court. I cannot allow *Hills* to say that he was not considered a substituted purchaser, although he was never confirmed. *Hills* underhand deals with *Alston*; he pays *Alston* what he ought to have paid into Court; and *Hills*, instead of desiring to be substituted in the first place, filed a bill against *Alston*. If a man makes a contract before the party of whom he purchases has had his purchase confirmed, he becomes a purchaser under the Court. This suit has not been conducted regularly: it is a most shameful case; and, in consequence of this very case, an order of Court has been made that the solicitor for the Plaintiff should not be solicitor for the purchaser. The commissioners recommended that order upon this very case. Mr. *Alston* enters into an agreement to transfer his contract before he had acquired a title under the decree of this Court: this must be for the benefit of the parties in the suit, and not for his own personal profit. The parties to the suit became entitled to receive the 300*l.* and the 1200*l.*; they are also entitled to receive

1880.

HODDER
v.
ROTTIN.

interest on the 1200*l.* until the purchase is completed, from one or the other. The question is, Who is to pay the 1200*l.*? *Alston* must, of course, pay the 300*l.* profit, with interest from the time he received it from *Hills*, the remaining part of the 1200*l.* must be paid by *Hills*.

I declare now that *Hills* shall be a substituted purchaser in the room of *Alston*; and that on payment of 900*l.*, minus the damages and costs in *Mrs. Burdett's* action 180*l.* (a), he shall have a good title and conveyance. Refer it to the Master to consider what allowance should be made out of the 1500*l.* in respect of any incumbrance upon the title not noticed in the conditions of sale; and whether the action brought by *Mrs. Burdett* ought to have been defended, and was properly defended; and reserve the question, whether *Alston* or *Hill* are to be allowed the deduction?

(a) This seems to be subject to the reference.

WESTMINSTER
HALL.
January 30.

BUTTER v. OMMANNEY.

An estate having been sold, in which the petitioners were interested, it was represented to them that a good title could not be made; and they were induced to give

MR. DIXON for the petitioner.

A freehold house had been sold in this cause to *Alexander Snodgrass* for 545*l.*, and that sale had been confirmed absolutely. The petitioners are jointly interested with the Plaintiffs and the other Defendants in the amount of the purchase-money. On the 11th of *December* 1829 the Plaintiffs' solicitors wrote a letter to

a brief to counsel to consent to the purchaser being discharged; they subsequently discovered circumstances which led them to conclude they had been deceived, and that in fact a good title could be made, and thereupon petitioned the Court that the order might be discharged. The Court discharged the order, giving the purchaser his costs, and referred it to the Master to enquire whether a good title could be made. The solicitor for the petitioner to have the conduct of the enquiry.

the solicitors of the petitioners, with the copy of a petition to be heard at the Rolls on the *Tuesday* following, and desired them to give a consent brief to counsel; and that petition stated, that there was not a good legal covenant in a certain indenture dated the 5th day of *June* 1788 for the production of certain title-deeds, and which title-deeds, there was great reason to fear, were lost; and therefore it had been advised, that the purchaser could not be compelled to complete his purchase, and prayed that he might be discharged therefrom. In the confidence of this statement the consent requested was given, and an order made thereon. The petition now before the Court stated information subsequently obtained, by which they had concluded that the title-deeds were not lost, and that even if they were, there was sufficient title, and prayed that the order might be discharged.

1890.
BUTTER
v.
OMMANNEY.

Mr. *K. Parker*, for Sir *Francis Ommanney*.

Mr. *Phillimore*, for other persons interested in the purchase-money.

Mr. *Rolfe*, for the purchaser.

Mr. *Wray*, for the Plaintiff and for Messrs. *Horton* and Son.

The MASTER of the ROLLS. I cannot hold these petitioners to a consent which was given on a representation that the title-deeds were lost. They certainly acted under the presumption that the title-deeds were lost. I must consider this case as if no consent had been given. The abstract was actually compared by *Horton* and Son with the deeds in the custody of *Currie* and Co. I must consider what would have been done

1890.

BUTTER
v.
OSMANNEY.

upon the original petition had not a consent been produced. I could not have compelled them to consent. If I cannot discharge the purchaser, must I not refer it to the Master generally to enquire whether a good title can be made? The purchaser must be indemnified in respect of costs, for no misrepresentation can be charged to him. The proper course will be, to direct a general reference whether a good title can be made. If it shall appear that there is not a good title, then the inference will be, that the present petition is unnecessary, and that will have its influence in deciding on the costs of the reference. All I can now do will be to discharge the order, and to refer it to the Master to enquire, whether a good title can be made, and when it was made.

Let the solicitor of the petitioner have the conduct of this enquiry before the Master; the purchaser to have his costs of this petition; the costs of other parties reserved. The purchaser to have leave to petition the Court to be discharged from the purchase on the 13th of February, and the order not to be drawn up until after that day.

WESTMINSTER
HALL.

February 1.

Will.

A testator having directed his executors to pay the interest of his residue to a woman during her

life, and after her decease to divide the residue amongst the next of kin:

Held, the next of kin at the time of testator's death were the persons entitled.

COLLISAM v. SAMS.

BY the will of the testator the executors were to invest the residue, "upon trust to permit *Hannah Fowler* from time to time, during her natural life, to receive the interest thereof; and after her decease upon trust to divide the same unto and amongst the next of kin, in a due course of administration."

Mr. S. Girdlestone. The question is, whether, after the death of *Hannah Fowler*, the next of kin meant were those living at the death of the testator or the death of *Hannah Fowler*? I believe, in fact, it must be taken to mean the persons who filled the character of next of kin at the time of the death of the testator.

1830.

COLLIER
v.
SAMS.

The MASTER of the ROLLS decided, that the next of kin meant were those at the time of the testator's death.

Reg. Lib. A. 1829. fol. 610.

ARNOLD v. CONGREVE and Others.

WESTMINSTER
HALL.

February 4.

THE testatrix, *Susannah Olivier*, by her will bequeathed as follows:—"I leave and bequeath 12,000*l.*, 3 per cents. reduced annuities, which I have now transferred from the 4 per cent. stocks, the same to be put in trust in the hands of my three executors, to be employed in the following manner: One half, or 6000*l.* of the said trust, the interest thereof shall be for the use of my son Rev. *Daniel Stephen Olivier* during his life, and shall be duly paid unto him as his property, and at his death, one half, which will be 3000*l.* said stock, shall revert to

A testatrix directs that the interest of 6000*l.* shall be paid to her son during his life, and at his death one half of the stock to go to the son's eldest male child living at the death of the testatrix; the other 3000*l.* to be

divided in equal shares between his other children lawfully begotten; but should the son of the testatrix die without leaving issue, then she gave the 6000*l.* over to her two other children during their lives, and at their deaths to their issue; and if either of them should die without leaving issue, then to the grandchildren which should remain.

By a codicil the testatrix willed, that upon the death of each one of her children who had issue, that her grandchildren's share be settled upon them, to enjoy the interest during their lives, and afterwards to revert to their children:

Held, that in respect to the gift to the eldest male child of the son "*living at my death*," the limitation over by the codicil of the 3000*l.* given to him by the will, is within the rules of law:

Held, that the gift of the 3000*l.* to the other children of the testatrix's son, being general, extended to all the children he might have, either before or after her death; and that the limitation over by the codicil to their children was therefore void.

1830.

ARNOLD
v.
CONGREVE.

my said son's *eldest male child living at my demise*, and the other half, or 3000*l.* said stock, 3 per cent. reduced, shall be divided in equal shares *between his other children lawfully begotten*; but should my said son die without leaving issue, in that case the whole of his moiety or 6000*l.*, 3 per cent. reduced stock, shall revert in equal shares between my other two children during their lives, and at their death it shall revert to their issue; or should either of them die without leaving issue, it shall in that case revert in equal parts to those of my grandchildren that shall then remain. The other moiety, or 6000*l.*, of the said 12,000*l.*, 3 per cent. reduced stock in trust, shall be divided in equal shares between my two daughters, *Julia Elizabeth Eyre*, and *Mary Esther Conybeare*, the interest of which shall be duly paid them during their lives, and at their death each one's share shall revert to their children; but should either of my daughters die without leaving issue, in that case their share of the said trust, which will be 3000*l.* 3 per cent. reduced, shall revert in equal shares between my surviving children; and at their death to revert to my surviving grandchildren in equal shares."

In one of the continuations of the will the following is contained :

" My three children, or their issue if they are dead, are to be joint residuary legatees, and are to share equally in all the residue of my fortune that is not otherwise bequeathed or disposed of."

And another clause is as follows :—

" I also leave and order to be put in trust by my executors 10,000*l.* Bank stock, which now stands in my name, the interest of which shall be duly paid in equal shares to each of my said three children during their lives,

and at her death, each one's share or third of the said 10,000*l.* Bank stock shall revert in equal shares between their *issue*; but should either of my children die without *leaving issue*, in that case their share or third of the said Bank stock shall revert to the remainder of my said children, and at their death to revert to their *issue*, or whatever *issue* shall remain from either of my said children, in equal shares."

1830.
 }
 ARNOLD
 v.
 CONGREVE.

And another clause is as follows: —

" All lapsed legacies are to return to the bulk of my fortune excepting those that are entailed, and the 700*l.* 3 per cent. consols that I leave to Mrs. *Passmer*, which reverts to my son the Rev. *Daniel Stephen Olivier*, after her death, at his own disposal, neither shall any untailed legacy return to the bulk (that I leave to either of my children in case they have any *issue*): and all the legacies I leave to my grandchildren shall revert to their brothers and sisters if they die minors, or if such legacies are not entailed; and even should they die in my lifetime, their shares shall equally revert from the time this will is written."

The testatrix appointed Dr. *William Conybeare*, Sir *Joshua Vanneck*, and the Rev. *Daniel Stephen Olivier*, executors of her will.

The testatrix made a codicil to her will, dated 30th *March* 1801, in which is contained the following clause:—

" I now furthermore request that at the death of each one of my children who have any *issue*, that the 10,000*l.* Bank stock, and also the 12,000*l.* 3 per cent. reduced, which by my will I have entailed upon my grandchildren, I would also have these my remaining grandchildren's said share of the same two stocks be also settled upon

1830.
 {
 ARNOLD
 v.
 CONGREVE.

them, to enjoy the interest thereof during their lives, and afterwards to revert to their children lawfully begotten; but in default of any issue, they may dispose of it as they may think proper."

The testatrix in another codicil named the Plaintiff an executor, instead of the Rev. *Daniel Stephen Olivier*.

The testatrix died in *January 1823*, leaving her son *Daniel Stephen Olivier*, since dead, and her daughters *Margaret Esther Conybeare*, since deceased, and *Julia Elizabeth Eyre*, the widow of Sir *William Congreve*, Bart, her only children her surviving.

Daniel Stephen Olivier died in *December 1826*: he had seven children, viz. two who died in the lifetime of the testatrix, *Harriet Elizabeth*, who attained twenty-one, but died unmarried and intestate in the lifetime of her father, but after the death of the testatrix, and two sons and two daughters, Defendants to this suit. One of those sons, *Daniel Josias Olivier*, attained twenty-one, and had eight children, two of whom died infants and intestate, and the others were Defendants to the suit, and all born after the death of the testatrix.

Anna Awdry Etough, another of the daughters of *Daniel Stephen Olivier*, attained twenty-one, had nine children, Defendants to this suit, and they were also born after the death of the testatrix.

Henry Stephen Olivier, another son of *D. Stephen Olivier*, attained twenty-one, had three children all born after the death of the testatrix, and Defendants to this suit.

Mary Arnold Olivier, the other daughter of *Daniel Stephen Olivier*, attained twenty-one, and is unmarried.

1890.

 ARNOLD
 v.
 CONGREVE.

Lady Congreve is a widow without children. Mrs. *Conybeare* died leaving two children, who survived the testatrix, one of whom, a Defendant to this suit, has had seven children, who are also Defendants to this suit; but the other, after attaining the age of twenty-one years, died, and his widow is his personal representative.

The bill prayed that the rights of all parties might be ascertained.

Harriet Elizabeth Olivier, the daughter of *Daniel Stephen Olivier*, who was born on the 18th of December 1791, died in August 1818, a spinster and unmarried; and upon her death, the Defendant *Daniel Josias Olivier* took out letters of administration: and the Master found, that *D. Josias Olivier* received a letter which had been produced to him, properly verified, from his father the said *D. S. Olivier*, shortly after the death of the said *Harriet Elizabeth Olivier*, in the words and figures, or to the purport and effect following: (that is to say,) "My dear son,—Your sister's dear remains I have seen carrying into the room prepared for that purpose. In opening *Henry's* letter to add a few words, I saw that yours (upon glancing that way) was merely a continuation of the same melancholy subject. I think you tell him your sister expressed a wish, as far as you could understand her, that you should take some of her money: take it all, for God's sake, if you choose, my dear son; only let her just and lawful debts be paid, and peace to her remains. D. S. O.—My doors, as you well know, would always have been open to your sister, whom I loved whilst living, and shall most readily comply with her last wishes, and wish to see them

1830.

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CONGREVE.

performed. Pray direct the Squire's letter, as I have mislaid the direction you left."

And he found, that, in consequence of such letter, the said *Daniel Josias Olivier* took out administration to the effects of the said *Harriet Elizabeth Olivier*, and possessed himself thereof, and afterwards divided the same between his brother *Henry Stephen Olivier* and his two sisters *Mary Arnold* and *Anna Audry Etough*, jointly with himself, the said *Daniel Josias Olivier*, in equal proportions.

And he found, that the said *Daniel S. Olivier* approved of such division, as appears by a memorandum signed by him, and dated the 8th of *February* 1819, which had been produced to him the said Master, which is in the words and figures following: (that is to say,)

" *Clifton*, 8th *February* 1819.

" I the Rev. *Daniel Stephen Olivier*, clerk, of *Clifton*, *Bedfordshire*, having waived all claim to the property of which my late daughter *Harriet Elizabeth Olivier* died possessed in favour of my son *Daniel Josias Olivier*, clerk, do hereby approve of his dividing the same in equal shares with his brother *Henry Stephen Olivier*, his sister *Mary Arnold Olivier*, and his sister *Anna Audry Etough*. (a)

" D. S. OLIVIER."

Mr. *Bickersteth* for the Plaintiff.

Mr. *Tinney* for *Daniel Josias Olivier*, the eldest son of *Daniel Stephen Olivier*.

He claims to be entitled to 3000*l.*, half of the 6000*l.*: he claims it absolutely. The codicil being so expressed

(a) On the effect of these letters there was much discussion: the result will be seen in the decree.

as to have given him, if it had been real property, an *estate-tail*, and, consequently, the absolute interest in it, as being personal. There are many cases in support of this construction, founded upon *Wylde's* case in 6 Co. 16. (a) In the codicil also the limitation is to the children of her grandchildren generally, which not being confined to those living at her death, may include, therefore, not only those grandchildren born at the time of the death of the testatrix, but also any others afterwards born until the death of their parent; and the fund being divisible, it must be held, therefore, a gift to unborn grandchildren for life, and then to their issue; and such a limitation would be void as too remote, and rejected, though all the grandchildren as here were actually born, and *in esse* in the lifetime of the testatrix. *Leake v. Robinson*. (b) This includes the shares of all the grandchildren, and, of course, that of *Daniel Josias Olivier*.

1880.

 ARNOLD
 v.
 CONGREVE.

The MASTER of the ROLLS. The testatrix by her will gives to the *eldest male child of her son living at her death*; and then the codicil limits the share of the eldest male child, as being one of the grandchildren, to a life-interest, with remainder to his children. It is nothing that with respect to the other grandchildren it might be void; it cannot be too remote as to such eldest son. The codicil must be so far construed, *reddendo singula singulis*.

Mr. Tinney resumed.

But with regard to the other grandchildren, they must take absolutely, and one of them was *Harriet*, who

(a) *Hodges v. Middleton*, Doug. 415. 431. 2d edit. *Seale v. Barter*, 2 B. & P. 485. *Robinson v. Robinson*, 1 Burr. 38. *Tothill v. Pitt*, 1 Mad. 488. *Murthwaite v. Jenkinson*, 2 B. & C. 558., and 5 B. & C. 191. *Jesson v. Wright*, 2 Bligh, 1. *Wooler v. Andrews*, 2 Bing. 126. *Hughes v. Sayer*, 1 P. W. 534.

(b) 2 Mer. 363.

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died without issue and intestate; and *Daniel Josias Olivier*, as having taken out the administration, is therefore entitled to receive her share; and two of his own children being now dead, he will be also entitled to their respective shares as their administrator and next of kin.

Mr. *W. O. Carr* followed on the same side.

The 3000*l.* only was given to *Daniel Josias Olivier* as the eldest male child living at the testatrix's death. He did not take his share in the 10,000*l.* as such *persona designata* at her death, but under the general description or class of grandchildren. He was entitled, therefore, absolutely to the latter, on the codicil being so far held void for remoteness. But the true effect of the codicil is to give Mr. *Daniel Josias Olivier* a *quasi estate-tail*, and therefore an absolute interest in both funds or shares.

The MASTER of the ROLLS. How is it possible that the testatrix gives him an absolute interest in the 3000*l.* when by the will she gives it to him absolutely, and by her codicil she states she limits the absolute interest so given by her will to a life-interest only. I must construe the will and codicil together.

Mr. *W. O. Carr* resumed.

In the case of *Seale v. Barter* the Court decided the construction on the codicil alone. It is not a question of *intention* that governs the cases cited in support of this construction. To use the words of Lord *Hale* in giving judgment in the case of *The King v. Melling (a)*, —“ It is possible that he did intend but an estate for

life, and it is by consequence and operation of law only that it becomes an estate-tail." The intention drawn from the will and codicil being taken together can but amount to an *express* declaration upon the codicil that he should take "for life and *no longer*;" which would make it similar to *Robinson v. Robinson*; and notwithstanding which the Court there held that an estate-tail was given. And the rule is the same in equity as at law, that however express or clear the interest be intended and limited for life, it will be enlarged by this necessary legal construction, or effect of such subsequent limitations. *Chandless v. Price* (a), *Mortimer v. West*. (b)

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But, should the Court decide upon the *intention*, the true construction must still be to give him a *quasi estate-tail*, and, therefore, an absolute interest in both funds or shares. For the courts have at least always endeavoured to carry into effect the *general* intent, though they sacrifice by so doing the *particular* intent. *Robinson v. Robinson*. The general intent here is to secure the grandchildren and their respective issue the shares bequeathed to their parents; and the particular intent in limiting life-estates by the codicil was only in furtherance of this. The limitations over, then, being void as too remote (except as to the 3000*l.* given to my client as the eldest son), the grandchildren would take only for life under the codicil, and the respective shares might go to the residuary legatees as undisposed of. By construing, however, the effect of the codicil to give a *quasi estate-tail*, this general intent is preserved. If it be contended that the codicil is executory, and therefore enables the Court to carry the legal intention of the testatrix into effect, as in *Hum-*

(a) 5 Ves. 99.

(b) Since reported, 3 Simon, 280.

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berston v. Humberston (a), the Court, in these cases, adopts or acts upon the doctrine of *cy. pres.*, *Mortimer v. West* (b), which is inapplicable to personalty. *Fearne*, 8th ed. 208. *Routledge v. Dorrill* (c), *Leake v. Robinson*. (d)

Mr. *Pemberton* for Mrs. *Anna Audry Etough*, a granddaughter.

It is clear that although you may limit to unborn children, you cannot limit upon that. The question is, Whether the codicil is not intended to effect such latter limitation, and therefore void for remoteness? Except the 3000*l.* given to the eldest male child of the son of the testatrix living at her decease, the other bequests are to the grandchildren generally, under which description or class may be included not only those *in esse* at the time of the testatrix's death, but any born after during their parent's life; and though in this case all the grandchildren were actually born during the testatrix's life, and therefore the limitations over by the codicil to their children, if properly expressed, might have been good, yet, in as much, as the limitation stands, it might extend to a limitation over to the children of grandchildren unborn in the testatrix's life, it must be void altogether: it cannot be held good as to part, and void as to the rest. *Leake v. Robinson*.

This being so, the limitations in the codicil are void except as to the 3000*l.* given to the eldest male child of her son living at her death; and as the sole intention of the testatrix, in limiting by her codicil the absolute interests given by her will to the grandchildren to life-interests was but for the purpose of further securing to

(a) 1 *P. W.* 332.

(c) 2 *Ves.* 567.

(b) 2 *Sim.* 280.

(d) 2 *Mer.* 365.

them and their respective issue the full benefit of their respective shares, and the object so intended cannot be legally affected, but is void for remoteness, the Court must so far reject the codicil *entirely*, and the grandchildren must take, therefore, absolute interests in their respective shares under the will as if the codicil had never existed, or at least affected their interests. With respect to the 10,000*l.* there is this further question, Whether "issue" extends to more remote issue than the grandchildren, so as to include their children with them in the bequest? I contend that it goes here no further than grandchildren, and then my client will take an absolute interest in her share of the 10,000*l.* also.

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Mr. Skirrow followed.

Mr. Treslove and Mr. John Boteler, for two others of the children of *Daniel Stephen Olivier*, supported Mr. Pemberton's argument.

Mr. Sidebottom and Mr. Elderton, for some of the children of grandchildren.

All the children being *in esse* at the time of the testatrix's death, the limitation over to their children by the codicil must be good, though in the limitation the grandchildren are not expressly confined to those *in esse* at the testatrix's death. The case of *Leake v. Robinson* is not in point, as there the testator attempted to limit to his unborn grandchildren, and also to postpone the vesting till *twenty-five*. The courts have never yet decided to restrain these powers of limitation as far as is now contended for, and have already gone far enough.

Mr. Teed, for the children of *Daniel Josias Olivier*, urged similar arguments.

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Mr. West, Mr. Roupell, Mr. Lowndes, and Mr. Warry,
for other children.

The MASTER of the ROLLS.

The law is perfectly well settled : there is no difference with respect to a limitation of freehold and personality. You cannot limit an estate after an estate limited to unborn children, which this testatrix has endeavoured to do. The question with respect to the two sums of 3000*l.* and 3000*l.* is, Has the testatrix confined her words to grandchildren born at the time of her death ? The words she has used are these :—“ I leave and bequeath 12,000*l.* 3 per cent. reduced annuities, which I have now transferred from the 4 per cent. stocks, the same to be put in trust in the hands of my three executors, to be employed in the following manner :— One half or 6000*l.* of the said trust, the interest thereof shall be for the use of my son the Rev. *Daniel Stephen Olivier* during his life, and shall be duly paid unto him as his property ; and at his death one half, which will be 3000*l.* stock, shall revert to my said son's eldest male child living at my demise.”

As to the 3000*l.* given to *Daniel Josias Olivier* as her “ son's eldest male child living at my demise,” the subsequent limitation in the codicil to him for life, and then to his unborn children, is within the rules of law, and not being void for remoteness, I shall hold it valid. Then, as to the other children, the will says, “ The other 3000*l.* stock shall be divided in equal shares between his other children lawfully begotten.” Do not these words include every other grandchild that could be afterwards begotten ? There can be no doubt upon it.

She afterwards makes a codicil, by which she desires to limit the interest of her grandchildren to a life-estate.

Now, having already stated that the limitation to the grandchildren includes not only those *in esse* at her death, but every other grandchild afterwards begotten, any limitation to their children must be not within the rules of law, but void for remoteness.

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It has been suggested very ingeniously by Mr. *Pemberton*, that as the codicil, with respect to the grandchildren being the children of the sons and daughters of *Daniel Stephen Olivier* (other than the eldest son in respect of one of the sums of 3000*l.*), had failed by reason of its giving an interest too remote, that the will, with that exception, is not affected by the codicil, and, consequently, that their interest rests upon the construction of the will only. And I am disposed to think that there is a clear intention that the codicil was only made to let in the great grandchildren; and as that fails, the intention of the testatrix will be best effected by declaring, that the interest given to those grandchildren by the will is not displaced by the codicil, and, consequently, that they took an absolute interest.

The minutes of the decree are as follow : —


Declare that, according to the true construction of the will and codicils of *Susannah Olivier* the testatrix, the Defendant *Daniel Josias Olivier*, as the eldest male child of the testatrix's son the Rev. *Daniel Stephen Olivier* living at the testatrix's death, is entitled during his life, and from the death of his said father *Daniel S. Olivier*, to the dividends and interest of 3000*l.* Bank 3 per cent. annuities, part of the 12,000*l.* like annuities in the will of the testatrix mentioned; and after his decease, any person interested in such one fourth part to be at liberty to apply. Declare, that as to the 10,000*l.* Bank stock, and all other the legacies and be-

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quests to the testatrix's grandchildren in the will and codicil contained, except as to the said 3000*l.* 3 per cent. reduced annuities, the limitation over to the issue of the testatrix's grandchildren contained in the codicil of the 30th of *March* 1801 is void for remoteness; and as to the 10,000*l.* Bank stock, the Defendant *Daniel Josias Olivier*, as one of the grandchildren of the testatrix, and the issue of her son *Daniel S. Olivier*, is absolutely entitled to a fifth of the third part of the 10,000*l.* Bank stock. Declare, that *Anna Awdry*, the wife of the Defendant *Richard Etough*, and the Defendants *Henry Stephen Olivier*, and *Mary Arnold Olivier*, and *Harriet Elizabeth Olivier* deceased, as the four other children of *Daniel Stephen Olivier*, and as grandchildren of the testatrix, became absolutely entitled to the 3000*l.* Bank 3 per cent. reduced annuities, further part of the 12,000*l.* like annuities, and to four fifths of the one third of the 10,000*l.* Bank stock in equal shares. Declare, that the share and interest of *Harriet Elizabeth Olivier* is effectually passed by the gift of the said *Daniel Stephen Olivier* in his lifetime to the said *Daniel Josias Olivier*, in trust for himself and the Defendant *Henry Stephen Olivier*, *Mary Arnold Olivier*, and *Anna Awdry Etough*. Declare, that the Defendant *William Daniel Conybeare*, and the late *John Josias Conybeare* deceased, as the children of *Margaret Esther Conybeare*, and grandchildren of the testatrix, are entitled to one half part of the 6000*l.* Bank 3 per cent. reduced annuities, being the residue of the 12,000*l.* like annuities, and to one other third part of the 10,000*l.* Bank stock in equal shares. Declare, that the Defendant Dame *Julia Elizabeth Congreve*, the daughter of the testatrix, is entitled during her life to the dividends and interest of the remaining 3000*l.* Bank 3 per cent. annuities, and of the remaining third part of the 10,000*l.* Bank stock. The dividends and interest from time to time to accrue due in

respect of the last-mentioned annuities and Bank stock to be from time to time paid to the Defendant Dame *Julia Elizabeth Congreve* by half-yearly payments during her life; and after her decease, any persons interested therein to be at liberty to apply. The Master to be at liberty to state special circumstances, and any of the parties to be at liberty to apply.

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Reg. Lib. A. 1829. fol. 1684.

BETWEEN

PETER VAWDREY and Dame HANNAH WESTMINSTER
 EVANS, - - - - - Plaintiffs; HALL.
 February 4.

AND

ARCHIBALD PERRIN GEDDES, JOHN HYS-
 LOP, JOHN ARTHUR BORRON, MARY
 VAWDREY, GILBERT VAWDREY, RICH-
 ARD VAWDREY, WILLIAM VAWDREY,
 THOMAS VAWDREY, SARAH DARELL
 VAWDREY, and PETER NICHOLSON,

Defendants.

THE testatrix, *Amy Seaman*, by her will, dated the 9th of January 1798, directed that all the produce

*Remote In-
 terest.*

of the residue of her estate and effects, after paying the legacies, her funeral expenses, and any debts which she might owe, should be placed out on mortgage or govern-

A testatrix by her will directed that the interest of the residue of

her estate should be divided between her four sisters during their natural lives, and on their deaths the interest to be applied in the maintenance or education, or accumulate for the benefit of the children of each of the sisters so dying, until they should severally attain the age of twenty-two, and upon their attaining that age, they were to become entitled to their mother's share of the principal; and in case of the death of either of them under that age leaving issue, such issue to be entitled to their respective parent's share, at such time as the parents would have been entitled thereto if living:

Held, that the gift to the children of the sisters was too remote.

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ment security, and the interest, dividends, or produce thereof should be equally divided between her four sisters, for their sole and separate use, and independent of the control or authority of their husbands, during their natural lives; and on the death of her sisters, she declared that the interest of their respective shares should, at the discretion of their executrixes, be applied in the maintenance, education, or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years, and upon any of their attainment to that age, they should be entitled to their proportion of their mother's share of the principal; and in case of any of their decease under that age leaving lawful issue, such issue should be entitled to their respective parent's share at such time as such parent would have been entitled, if living, thereto, with the benefit of the interest or produce thereof in the mean time; but in case any such children should die under the said age without leaving issue, or such issue should die before they were entitled to the principal of their shares, that then the other children of her said sisters should be entitled thereto, together with the issue of any of them who should be then dead, in like manner, and with like benefit of survivorship, as their original shares; but in case all the children of any of her said sisters should die without issue, or there being such issue, they should all die before the principal of their respective shares should become payable, then the share of such of her sisters, whose children should so die, should be paid and applied to and for the benefit of her other sisters and their respective children or issue, in like manner as their original shares; and upon the decease of her sister, *Hannah Evans*, leaving no issue, she willed that her brother-in-law, *William David Evans*, should have the interest and produce of her share during his natural life; and that upon his decease, the same should be

applied to and for the benefit of her other sisters and their children, in like manner, and with like power of survivorship, as the shares of her other sisters were.

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The testatrix died on the 27th of *August* 1798, leaving her sisters, *Elizabeth*, the wife of *James Nicholson* (since deceased), *Mary*, the wife of *Daniel Vandrey*, who was then living, *Catherine Perrin*, widow, since deceased, and Dame *Hannah Evans*, then the wife of, and now the widow of, Sir *William David Evans*, and who is now living, her only next of kin her surviving, the four sisters of the testatrix mentioned in her will.

Elizabeth Nicholson, one of the testatrix's sisters, died on the 2d *February* 1810, leaving one child only, the Defendant, *Peter Nicholson*, who attained the age of twenty-two years, and procured letters of administration of the effects of his mother, and he thereby became her legal personal representative.

Catherine Perrin, another of the testatrix's sisters, died on the 5th of *February* 1803, leaving one child only, *Sarah*, the wife of *William Geddes*, who died on the 5th of *July* 1803, of the age of nineteen years, leaving only one child, the Defendant, *A. P. Geddes*, who attained the age of twenty-two years; and he having procured letters of administration to the effects of his mother to be granted to him, he thereby became the legal personal representative of the said *Sarah Geddes*.

Catherine Perrin, by her will, dated 16th *May* 1802, appointed *William David Evans* and *Thomas Lyon* her executors, both of whom proved the same, and thereby became her legal personal representatives. *W. D. Evans* survived *T. Lyon*, and died in *December* 1821, having by his will appointed the Plaintiffs, *Peter Vandrey* and

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Dame *Hannah Evans*, his executor and executrix, who duly proved the same, and thereby became the legal personal representatives of the said *Catherine Perrin*.

The Defendant, *Mary Vawdrey*, had six children, who are all living; namely, the Defendant, *Gilbert Vawdrey*, then in the fiftieth year of his age; the Plaintiff, *Peter Vawdrey*, then in the forty-ninth year of his age; the Defendants, *Richard Vawdrey*, then in the forty-seventh year of his age; *William Vawdrey*, then in the forty-fifth year of his age; *Thomas Vawdrey*, then in the forty-third year of his age; and *Sarah Darell Vawdrey*, then in the fortieth year of her age. The Defendant, *Mary Vawdrey*, never had any other children or child.

Dame *Hannah Evans* never had any children or child.

The Master reported that he could find no other next of kin.

Mr. *Duckworth* for the Plaintiff.

Mr. *Bickersteth* and Mr. *Koe* for Defendant, *Archibald Perrin Geddes*, cited *Leake v. Robinson* (a), and *Bull v. Pritchard*. (b)

Mr. *Pemberton* and Mr. *Simpkinson* for the executors of *William Geddes*, as the representative of *Sarah Geddes*. The bequest over after the gift to the issue, after the gift to the children of the sister of the testatrix, is clearly void, and is admitted so to be on all sides. But we say that the gift to the children themselves is absolutely vested, *Hanson v. Graham* (c), subject only to be divested on

(a) 2 Mer. 363.

(b) 1 Russ. 213.

(c) 6 Ves. 239.

their dying under twenty-two, which is a void limitation, and cannot therefore divest the estates.

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In the case of *Booth v. Booth* (a), there was a gift of the residue to trustees who were to pay interest to two grand nieces till their respective marriages, and then to transfer to them their respective shares. One died unmarried; but the Court held that her share had vested in her, and belonged to her executors.

Mr. Temple for Mr. Nicholson. The difficulties of this case may be avoided by holding that the gift is only to such children as were in existence at the time of the testatrix's death; for in that case it would not be contrary to any rule of law that the vesting of the principal be postponed until they arrive at the age of twenty-two, or to any other time during their lives. The difficulties would also be avoided by holding that all the children took vested interests, subjected by the will to be divested by their not attaining twenty-two; which condition could not have any operation, not being confined to children then in existence, so that the children would take an absolute interest.

The MASTER of the ROLLS.

This is a bill filed to take the opinion of the Court on the construction of the will of *Amy Seaman*. The testatrix has directed the residue of her estate to be invested, and the interest to be divided between her four sisters during their natural lives; and on the death of her sisters, she has declared that the interest of their respective shares should be applied in the maintenance,

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and education, or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years; and upon any of them attaining that age they should become entitled to their mother's share of the principal; and in case of the decease of any of them under that age, leaving issue, such issue should be entitled to their respective parent's share, at such time as such parent would have been entitled, if living, thereto.

The testatrix gives for life to the four sisters: two of them are dead; and the question is, What is to be done with their shares? One of them left a daughter, who married *Geddes*, but died under twenty-two, leaving an only child, who has attained twenty-two. The other sister, *Mrs. Nicholson*, left a son, *Peter*, who has attained twenty-two. The share of his mother was for some time treated as his; but a doubt having arisen, whether the limitation was not too remote, an opinion was taken, and this suit was instituted.

The authorities cited are extremely nice, and shew the difficulties of this case, particularly in distinguishing this case from the case of *Booth v. Booth* (a), before Lord *Alvanley*; but it can hardly be distinguished from the case of *Leake v. Robinson* (b); (His Honor here read the residuary clause of the will in that case;) the time of payment there was to be at the age of twenty-five or marriage. Now this, like the present case, was a residuary bequest; and in *Booth v. Booth* Lord *Alvanley*, though not perhaps satisfactorily, thought the Court should construe a residuary gift more favourably than


(a) 4 Ves. 399.

(b) 2 Mer. 365.

a general legacy to make the share vest, in order to prevent an intestacy. That distinction would be in favour of this case. The interest is to be applied to the maintenance of the children until they attain twenty-two, and then they are to be entitled to the principal. There can be no difference whether the age is twenty-two or twenty-five. In *Leake v. Robinson* the share was to vest at twenty-five or marriage; in this case at twenty-two only. This case may therefore be said to run on all fours with that of *Leake v. Robinson*. It has been argued that this was vested because maintenance was given; but it has never been held vested where it was given over if the legatee did not attain a certain age. Here the testator has directed that if a child die before he attains twenty-two years, his share shall go over; that repels all presumption of vesting, because simply maintenance is given. There is a different rule with respect to freehold, as in *Boraston's case* (a), and the cases which followed it. But in no case has personal property been held to vest, notwithstanding interest is given to the legatee, where the legacy is given over, and where a certain age is to be attained. On the part of *Nicholson*, the grandson, it was said by counsel that the words applied to children living at the death of the testator; but that cannot be.

With respect to what has been said about accumulations, the act on that subject was passed in the fortieth year of the late king; and this will having been made in 1708, the act does not apply.

My opinion being that the gifts to the children of the sisters are void, as too remote, the subsequent gifts are

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(a) 5 Co. 19. *Doe v. Lea*, 3 T. R. 41.

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also too remote, and the shares as they drop in, belong to the next of kin.

The costs to come out of the residue.

See *Gilbert on Uses*, p. 261., Mr. Sugden's note. *Proctor v. Bishop of Bath and Wells*, 2 H. B. 358. *Cambridge v. Rous*, 8 Ves. 12. *Lade v. Holford*, 3 Burr. 1416. *Blandford v. Thackerell*, 2 Ves. jun. 238. *Taylor v. Biddall*, 2 Mod. 289. *Stephens v. Stephens, Forrester, Cases temp. Talbot*, 228.

BETWEEN

WESTMINSTER
 HALL.
 February 8.

THOMAS BAKER and ANN his Wife, late ANN
 CREASE, Widow, - - Plaintiffs;

AND

WILLIAM BENT, - - Defendant.

Reversions.

A person having a reversionary interest expectant upon the death of R. without issue, sells the same. Many years after, a bill is filed to set aside the sale, on the ground of inadequacy of consideration :

THE Plaintiff, *Ann Crease*, then the wife of *Walsingham Crease*, being under the will of *James Finlayson* seised of four equal undivided eleventh parts of a wharf and two houses in *Cannon Row* in *Westminster*, in the occupation of the Defendant or his under-tenant, in reversion expectant upon the death of *James Roby*, without issue male, agreed to sell the same to the Defendant for 275*l*.

James Roby was then about sixty-four or sixty-five years of age, and had not any male issue, and was not married.

Held, that the Court will not enter into the value of property on such a contingency.

But it appearing that the treaty was entered into on a basis of considering the contingency to be half the value of the reversion, the Court directed an enquiry of the real value without reference to the contingency, and directed that that contingency should be rated at one half the value.

In *April* 1818 the Plaintiff *Ann Crease*, and her then husband, by lease, release, and fine, conveyed this property to the Defendant.

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James Roby died on the 11th of *September* 1822, without issue.

The bill stated, that the annual value of the four elevenths was at the time of the purchase, and then was, 157*l.*; and that the Defendant actually paid that rent for four other eleven parts or shares of the same premises, which he held as tenant to a *Mrs. Fearnall*, the owner thereof.

The bill charged, that the Plaintiff and her husband were, at the time of the sale, in poverty and distress, and that the Defendant was acquainted with it. And also charged that the consideration was grossly inadequate; and the bill prayed, that the agreement and conveyance might be declared fraudulent and void, and be delivered up to be cancelled.

The Defendant, by his answer, set forth a letter from *Mr. and Mrs. Crease's* solicitor, desiring to know, whether he would be disposed to treat for the purchase of the reversionary interest on having a clear title; that the parties were determined to endeavour to effect a sale, but previously to a public sale they wished the Defendant to have the option of refusal.

After some time a price was named on behalf of the vendors at 1200*l.*, for the reversion after the death of the present tenant for life.

The Defendant's solicitor offered 550*l.*; but on the delivery of the abstract of title, it was found that the vendors had not an absolute reversion expectant on the

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death of *James Roby*, but a contingent reversion expectant not only upon his death, but on his dying without issue, and on *Elizabeth Roby* dying without issue. She was then fifty-eight, and had never been married. She died in 1821. *James Roby* died in 1822. The Defendant ultimately offered 275*l.*, which was accepted.

The Defendant admitted, that as tenant to the trustees of Mr. *Fearnall* of four other eleven parts or shares of the same premises, he paid them the annual rent or sum of 152*l.* 15*s.*; but Defendant believed that no new tenant for the entirety of the premises would give 420*l.* 1*s.* 3*d.*, being after the same rate as Defendant so paid to the trustees of Mrs. *Fearnall* for their four elevenths.

No replication having been filed, this cause came on to be heard on bill and answer.

The effect of the evidence is stated in his Honor's judgment.

The value of the reversionary interest estimated by Mr. Morgan, supposing the rent to be 420*l.*, was 2592*l.*; but in this the contingency of issue was not taken into computation, and he would not take upon himself to say what deductions should be made on that account.

The evidence of the Defendant by two surveyors was, that from 270*l.* to 300*l.* was the value of the four elevenths, under all the circumstances of the contingency.

Mr. *Pemberton* for the Plaintiffs. This bill is filed to set aside a sale of land, that interest being reversionary. The Plaintiff *Anne*, in the year 1816, was the wife of *Walsingham Crease*, an attorney's clerk, and he was living in a garret.

The Plaintiff Mrs. *Baker*, then Mrs. *Crease*, was entitled to four elevenths in reversion of *James Roby*, and the interest was liable to be reduced by him or *Elizabeth Roby* having issue: he was sixty-three, and she was fifty-eight. The first point is as to the value; and if the purchaser of a reversion fails to shew that he has paid the full value, the Court will set the sale aside: this was decided by Sir *William Grant*, and has been recently acted upon by your Honor. (a) There was also misrepresentation; for it being held at half the yearly rent it was worth, Mr. *Bent* even represented that rent to be less than it actually was. I shall prove, that though he represented the rent to be 70*l.* for these four elevenths, he paid 85*l.*; and it is in proof that he paid for another four elevenths 157*l.* rent.

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 {
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Immediately after the existing contract was determined by the death of the tenant for life, the rent was raised to 157*l.*

I will first call the attention of the Court to the evidence of Mr. *Morgan*, and the Court will see it is clear that the Plaintiff did not receive one third part of the value of the property sold.

He values at 2592*l.*, the entirety at a rent of 420*l.*; but he did not take into consideration the contingencies. Now the Defendant in his answer says, that the value of the contingencies is one half; and the Court will then deduct one half, and the remainder will be about 1300*l.* But let the rent be taken at 210*l.* only, instead of 420*l.*, there would then be a remainder of 700*l.*

The witnesses on the part of the Defendant do not give the least notion of the grounds on which they make their valuation.

(a) And see *Hilliard v. Gambel*, *infra*, note.

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v.

BENT.

Under these circumstances, it is shewn that a purchase has been made by the Defendant at a price much under the value; it is clear that he purchased by misrepresentation. Admitting there was no knowledge in the Defendant of the distressed circumstances, it is perfectly clear that the Defendant has not given the value of the four eleven parts, the contingencies of one of sixty-three and the other of fifty-nine having issue amount to nothing. It is incumbent upon the purchaser of a reversion, even without any fraud, to shew that he has given the full price: this is the doctrine of the Court.

Mr. *Moore* followed, also for the Plaintiffs.

Mr. *Bickersteth* and Mr. *Beames* for the Defendant.

There never was a case more free from fraud and surprise: the vendors went to the Defendant; and so far was he from being anxious to purchase the property, that he refused so to do. They then employed their solicitor, Mr. *Baker*, who entered into a treaty with the solicitor of Mr. *Bent*. There is no evidence of Mr. *Bent* being acquainted with any distress, except that Mr. *Baker* once said his clients were poor. It was in treaty and negotiation from 1816 to 1818; fraud and surprise are therefore out of the question. The real rent had been previously communicated to the Plaintiff; 70*l.* was considered a permanent rent.

(In answer to a question put by his Honor, he was informed that the answer to a bill filed by Mr. and Mrs. *Crease* against the executor of the person under whose will they took the property, and in which the actual rent appeared to be 85*l.*, was filed in 1814.)

Mr. *Bickersteth*. There is nothing like misrepresentation; and the bill must be dismissed with costs.

Mr. *Pemberton* cited a case, where a reference had been made to the Master, who reported a value of 600*l.*, deducting 115*l.* for the contingency of issue. It was argued here and before the Chancellor.

1830.

BAKER
v.
BENT.

The MASTER of the ROLLS. I have no recollection of it. Can the Plaintiff establish, that the calculations proceeded upon a less rent than they ought to have done? One man at sixty-three may marry in a year; another man, with other dispositions, might not do so. How is it possible to make any computation of the value of such contingencies?

Mr. *Pemberton* in reply.

I have already stated a case which was argued before your Honor when Vice-Chancellor: the contingency was the death of a person of the name of *Newton*, without issue male. He was married. [*MASTER of the ROLLS.* What age was his wife?] That did not appear. In that case a reference was made to the Master to report the value, and the Lord Chancellor confirmed your Honor's decree; but it does appear to me that the Court is not embarrassed with that difficulty. We have here Mr. *Bent* dealing for this, and he well knew Mr. *Roby*. He had illegitimate issue; and therefore there was the less chance of his marrying. Mr. *Bent* offered to become the purchaser, allowing one half for the contingency: this is according to his own statement. Therefore take the value, and deduct one half for the value of the contingency; and yet we find that he has not paid more than one third of the value of the property: then the actual rent was not half the value. It is sufficient for me to shew that the treaty proceeded on a mistake. It is said we knew the value; but in the sale of a reversion it is for the purchaser to make out that he has given the full value: that was decided by Sir *William Grant*. This is a reversion purchased at less than the value, and therefore the purchase cannot stand.

1830.

BAKER
v.
RENT.

The MASTER of the ROLLS. Had this case turned upon the question whether a proper value had been given for a contingency, I should have dismissed it with costs; for how can a value be put upon the contingency of a man's marrying and leaving issue? But if a treaty proceed upon a notion that the annual value is less than it really is, it would be plain that less than the value was given. Was the calculation in this case made upon a less rent than was actually paid? Now the calculation here was made upon an annual rental of 70*l.*; and Mr. *Nelson*, the Defendant's solicitor, in his letter so stated it: whereas the truth is, it appears, that the rent was 80*l.* 10*s.* There is reason to suppose that the calculation did not proceed upon the real value. In 1822, on the death of the tenant for life, a lease was granted at 420*l.*, which for the four elevenths was 152*l.* per annum. It is then said, that this price was given for the local advantages; but I concur with Mr. *Pemberton*, that it is incumbent on the Defendant to prove the value. This has been long acted upon.

I am therefore disposed to send an enquiry to the Master, What was the value in 1817, when the contract was entered into? But how can you value the contingency? It appears, as has been stated by Mr. *Pemberton*, that these parties have considered this contingency as of the value of one half of the property, and concluded the treaty on that basis. Misrepresentation is not charged in the bill. Upon the whole, I think the justice of this case will be best answered by directing an enquiry what was the actual value of the reversion of four elevenths of that property at the time of the treaty, without respect to the contingency.

This certainly is not a case to be favoured; for it is not until 1828 that the bill is filed. If the price given shall appear to be not one half of the value at the time I shall declare the purchase void, but without costs. I

cannot give costs; the tenant for life having lived five years after the agreement, and six years having elapsed from his death until the bill was filed.

1830.

BAKER

v.

BENT.

Declare, as between these parties, this contingency is to be considered as of the value of one half of the reversion.

Let an enquiry be directed what was the value of the reversion at the time of the agreement, without reference to the contingencies.

No costs given up to the hearing.

Reserve further directions and costs.

Reg. Lib. A. 1829. fol. 2385.

HILLIARD v. GAMBEL.

1829.

July 22.

This was a bill filed in 1826, to make void a sale of a reversion made in 1805; it was proved that the price was inadequate. It was held, that in a suit to make void the sale of a reversion, it was not necessary to prove fraud or surprise; inadequacy of consideration being alone sufficient, by the decided cases, to authorise the court to make void the sale and treat the purchaser of a reversion only as a mortgagee: that is, that the vendor, paying the purchaser his principal, interest, and costs, is entitled to a reconveyance.

Reg. Lib. A. 1828. fol. 2657.

M'NAB v. MENSAL.

Thursday,

Feb. 11. 1830.

Practice.

IN this case Mr. *Bagshawe*, the counsel for a subsequent incumbrancer, asked to be dismissed, being satisfied she would never get any thing, and undertaking to join in any conveyance she might be called upon to execute.

The MASTER of the ROLLS said that she ought to have disclaimed on her answer. She must remain a party.

1830.

Thursday,
February 11.

DOVER v. EVERARD.

Executor.
Practice.
Costs.

A person appointed with another executor, and who disclaims, but who does some acts as a friend of the family, is not to be considered to have acted as an executor, and a bill against him as such would be dismissed with costs.

THE question was as to the responsibility of an executor who had disclaimed. He executed a disclaimer, as he stated in his second answer, on the 23d February; yet it appeared that he did some prior acts.

The MASTER of the ROLLS. In the absence of circumstances, he would be thought to have acted as executor; but by the evidence he was only acting as agent of the other executor, and as a kind friend of the family, friendly advising them in the disposal of the estate. It is perfectly plain that the Defendant never meant to act as executor.

Bill dismissed, as against that executor, with costs.

Account directed against other parties.

ROLLS.
February 13.

ROFE v. SOWERBY.

The testator directed his personalty to be invested for the sole use and maintenance of his daughter until she arrived at twenty-one; and when she attained

twenty-one, the remainder to be paid to the daughter.

She died under twenty-one:

Held, a vested interest.

JOHN ROFE by his will bequeathed in the following manner:—"I direct all my just debts, funeral expenses, and the charge of proving this my will, be fully satisfied and paid. I desire that my furniture and linen may be sold after my decease to be converted into money, together with my funded property and house; likewise 50*l.* which I am entitled to from my club, be in-

vested in the hands of my executors for the sole use and maintenance of, bringing up and supporting my dear daughter *Rebecca Warman Rose* until she arrives at the age of twenty-one; and when she attains the age of twenty-one, to receive the overplus, should there be any remaining from the above funded property, house, and 50*l.* left me by my club, after paying the expenses incurred for the maintenance, support, and education of my daughter *Rebecca Warman Rose*, the remainder to be paid into her hands for her sole use and disposal."

1830.
ROSE
v.
SOWERBY.

Rebecca Warman Rose died under age, unmarried, and intestate, leaving the Plaintiff, her only surviving aunt and next of kin.

The testator left three sisters, the Plaintiff, and two others who died in the lifetime of *Rebecca Warman Rose*; and the question was, Whether the bequest was vested in *Rebecca Warman Rose*? If it were, the property went to the Plaintiff as her surviving aunt and sole next of kin; on the other hand, if it did not pass, it became the property of the Plaintiff, in conjunction with the representatives of the two deceased sisters.

The MASTER of the ROLLS. I am of opinion that this is a vested interest.

Declare that it was vested in *R. W. Rose* the infant; and upon her death, intestate, under twenty-one, went to her next of kin.

Refer it to the Master to ascertain who were the next of kin of *Rebecca Warman Rose* at the time of her death.

Reg. Lib. 1829. B. fo. 766.

1830.

ROLLS.

February 18.

BARTON v. TATTERSALL.

Insolvent Acts.

A person who had been twice discharged by the court for the relief of insolvent debtors died possessed of considerable property :

Held, that this court could administer the fund : that first the creditors subsequent to the second insolvency should be paid ; then those after the first insolvency ; and, lastly, those before the first insolvency.

PHILIP JACOBS, on the 14th *September* 1814, was discharged from the King's Bench prison by the commissioners under the act for the relief of insolvent debtors, having previously executed the usual assignment to the provisional assignee. He subsequently resumed his business, and again becoming embarrassed, on the 22d day of *February* 1820 he again took the benefit of the act, making the usual assignment to the provisional assignee, and entering into the recognizance required by the act 54 G. 3.

He subsequently became possessed of property ; and on the 4th of *December* 1826 he made his will, and thereby appointed the Defendant, *Edmund Tattersall*, his executor.

The testator died on the 6th of *January* 1827 ; the Defendant proved his will, and possessed himself of exchequer bills, long annuities, and other property. The Plaintiff was the assignee under both insolvencies, and was a creditor under each of them.

The bill stated the preceding facts, and charged that the personal estate of *P. Jacobs* was more than sufficient to pay in full and discharge all his debts due at the time of his death, and which were contracted after his discharge as aforesaid ; that after payment thereof, a very considerable surplus would remain, and would be applicable, and ought to be applied, in and towards payment of the Plaintiff and the other scheduled creditors of the said *P. Jacobs*, under his insolvencies as

far as the same would extend; and that the Plaintiff was entitled to receive such surplus in order to apply the same accordingly. The bill prayed to that effect.

1830.

 BARTON
 v.
 TATTERSALL.

The Defendant admitted, by his answer, that there would be a surplus after paying the debts of the testator contracted subsequently to his discharge under the insolvent debtors' act; and he submitted to act under the direction of the Court.

Mr. *Pemberton* and Mr. *Parker*, for the Plaintiffs, called the attention of the Court to the statutes for relief of insolvent debtors in *England*; this case is not within the provisions of the statute of limitations; that statute bars the remedy, but does not destroy the right. By the acts for the relief of insolvent debtors in *England*, although the debtor be discharged, yet his goods and chattels are still liable: the legislature, contemplating that the insolvent might acquire future property, provided for the interest of the creditors upon it; which shews the intention of the legislature that the statute of limitations should not apply. The insolvent died in 1826, possessed of considerable property; and his executor in his answer admits that he had more than was sufficient for payment of all his debts: the estate is liable for the debts contracted before the insolvencies, after payment of the debts subsequently contracted.

Mr. *Bickersteth* and Mr. *Merivale* for the Defendants. The Plaintiff is the assignee of both insolvencies; the Insolvent Debtors' Court has refused to put the recognizances in force; the insolvent acts discharge the person and not the estate, so that creditors have the same remedy against the property of the insolvent as if the act had not been made. The insertion of the name of the creditor in the insolvent's schedule does not alter the

1830.

BARTON
v.

TATTERSALL.

case, and that is all the insolvent has done: there is, therefore, nothing here to bar the operation of the statute of limitations.

Mr. Pemberton. The assignee of an insolvent is no more barred by an insolvency than the assignee of a bankrupt, who can claim all his property up to the time of his certificate.

The MASTER of the ROLLS. This is the case of a bill filed by the assignee of an insolvent debtor. All the acts present only the liability of the estate of an insolvent to the payment of the debts from which he has been discharged after the payment of his subsequent debts. They all present a particular mode, which has not been pursued in the present case; and the question is, Whether a court of equity can administer the assets in its own mode? I am of opinion that it can. The insolvent has taken the benefit of the act twice; and the order of the Court must be, to pay last the creditors under the first insolvency. I do not consider the lapse of ten years of any importance; for this case is not within the statute of limitations.

The statute of limitations does not affect the creditors of an insolvent in respect of the time elapsed since his discharge.

Declare, that after payment of the debts and funeral expenses since the last insolvency, the surplus assets of the testator's estate is applicable to the payment of debts under the second insolvency, and then in payment of the debts under the first insolvency.

The usual accounts and directions.

Reg. Lib. A. 1829. fol. 1118.

REPORTS OF CASES

ARGUED AND DETERMINED

1830.

IN

The High Court of Chancery.

WATSON and Another v. REED.

ROLLS.
February 15.

THE Plaintiffs, on the 1st day of *June* 1826 contracted to sell some houses to the Defendant. The Plaintiffs' solicitor delivered an abstract in due time, and in *September* 1826 the Defendant's solicitor examined it with the title deeds, and on the 21st *September* 1826 the Defendant's solicitor returned it to the solicitor for the Plaintiffs, with inquiries and observations. Some further correspondence passed on the title, and on the 7th *April* 1827 the Defendant's solicitor wrote to the solicitor of the Plaintiffs that, under all the circumstances, the Defendant declined to complete the purchase.

*Vendor and
Purchaser.
Delay.*

—
A purchaser having given notice that he would not complete the purchase, and the vendors having delayed to file their bill for specific performance more than twelve months after that notice, the Court held, that it was an unwarrantable delay, and dismissed the bill with costs.

On the 20th of *April* 1828, and not till then, the Plaintiffs filed their bill for specific performance. The Defendant by his answer submitted that no part of the purchase-money, nor any interest thereon from any time, remained due from him on account of the purchase, inasmuch as he insisted that by reason of the lapse of time after the notice given by him of the abandonment of the purchase until the adoption of any proceedings on the

1830.

WATSON

v.

REED.

part of the Plaintiffs to enforce the said agreement, the Plaintiffs must be deemed and considered to have acquiesced in such abandonment, and could not now enforce the performance thereof.

Mr. Preston and Mr. Girdlestone for the Plaintiffs.

Mr. Hayter for the Defendant.

The MASTER of the ROLLS. On the 7th of *April* 1827 the vendors are informed that the purchaser would not complete the contract, and the vendors take no step until the 20th of *April* following, more than twelve months; when they file this bill. This is a most unreasonable delay, and the vendor is not entitled to the interference of this Court.

Bill dismissed with costs.
Reg. Lib. 1829. B. p. 621.

1830.

SABERTON v. SKEELS.

WESTMINSTER
HALL.

June 12.

THOMAS SKEELS, by his will, having directed his trustees to convert his personal estate into money, directed them to pay his debts; secondly, 400*l.* to his wife; thirdly, to pay to his daughter *Elizabeth*, the wife of Mr. *Joseph Saberton Saberton of Chattens*, the sum of 1000*l.* at the end of one year after his decease, to be settled in the same manner, and subject to the same uses, powers, and limitations in every respect as were thereafter contained as to the respective sums of 1000*l.* to be settled on his daughters as was thereafter mentioned; and, fourthly, to pay to each of his daughters, *Mary, Harriett, Ann, Joanna, and Sarah*, and to any child or children which he might have after the making of that his will, or who might be born after his decease, the sum of 2000*l.* each, to be paid to them as thereafter was mentioned. And as to the said several sums of 2000*l.*, the testator thereby directed the interest of the share of each of them to be computed from the day of his decease, or as much thereof as might be necessary to be paid and applied for their bringing up, education, or other advancement, until they should respectively attain the age of twenty-one, or, if a daughter, until her marriage, if she marry under twenty-one with the consent and approbation of his said trustees, or the survivors or survivor

Husband and Wife.
Wife's Property.
Personal Representatives.
Construction of those words.

A testator having given by his will legacies to his several daughters, directed that 1000*l.* of the legacy to each of them should be invested in the name of trustees, and the daughter entitled, in trust to pay her the interest, for which her receipt should be sufficient, and it should not be subject to the debts of her husband, and the principal should after her death pass and be subject to any will or disposition she might under her hand and seal make thereof, and for want thereof should go to her personal representatives.

The Plaintiff married, in succession, two of the daughters:

Held, that the words "personal representatives," mean executors and administrators; that the wife took an absolute interest, and that the husband on her death became absolutely entitled.

The marriage with the second sister having been solemnized in *Scotland*, an inquiry was directed, whether it had actually taken place,

1830.

SABERTON
v.
SKEELS.

of them, or of the executors or administrators of such survivor; and upon any of them attaining the age of twenty-one years, or upon the marriage of any daughter before that time with such consent as aforesaid, then he directed, that as to such daughter, the sum of 1000*l.*, together with the whole accumulations of interest, be paid to such daughter; and that the remaining 1000*l.* to each be settled as thereafter mentioned; and as to the said several sums of 1000*l.* so to be settled, he did thereby direct that each sum of 1000*l.* so belonging to each be invested in the funds in the names of his said trustees, and the daughter entitled to the same, or should, in the same names, be put out on real security, the interest thereof to be paid to his daughter entitled to the same, for which her receipt alone should be sufficient, and which should not be subject to the debts or control of any husband she might have, and should, after her death, pass and be subject, according to any will or disposition she might, under her hand or seal, make thereof, and for want thereof, should go to her personal representatives; and if the daughter so entitled to the 1000*l.* should at any time choose to sink the same, or any part thereof, in the purchase of one or more annuities for her own life, in like manner payable to her sole use, and not subject to the debts of her husband, his said trustees, together with such daughters, were thereby authorized and required to invest the same accordingly on government or good real security, but not otherwise. The Plaintiff married two of the daughters, *Elizabeth* and *Harriett*: they are both dead. *Elizabeth* left three children. Neither of those daughters made any will or disposition of the funds, and the Plaintiff took out letters of administration to the effects of each of them.

Mr. Tinney, and Mr. Preston, for the Plaintiffs.

Mr. Tinney. The question is, whether the husband is not entitled to the portions of the two sisters whom he married in succession, those sisters having died without making any appointment, and the husband having survived them? In the case of *Price v. Strange (a)*, the testator directed the money arising from the sale of his real estates to be divided amongst such of his children as should be then living, and the legal representative or representatives of him, her, or them, as should be then dead; and your Honor there said, that the ordinary sense of legal representatives is executors or administrators, and that the children took a vested interest. The cases of *Evans v. Charles (b)* and *Bridge v. Abbott (c)* were cited; in the former, a testatrix directed, that if a legatee died in her lifetime the legacy should be paid to her personal representatives, and the Court held that her administrator took beneficially. The words "personal representatives" are words of limitation,—in some cases there has been a difference of phrase,—but here we have the term "*personal representatives*," which is as definite with regard to chattels as "*heirs*" is to land. There are two other cases in which the point was adverted to, — *Anderton v. Dawson (d)*, *Bayley v. Wright. (e)*

1830.
 SABERTON
 v.
 SKELLS.

I submit that the testator has done no more in the events that have happened than to give a vested interest.

Mr. Preston. The words are, "personal representatives," not "next of kin," which is a most important distinction. Words must be construed in their genuine sense, unless a different construction can be put upon

(a) 6 *Mad.* 350.

(b) 1 *Anstr.* 128.

(c) 5 *Mad.* 224.

(d) 15 *Ves. jun.* 542.

(e) 18 *Ves.* 49.

1830.

SABERTON
v.
SKEELS.

them by the context of the instrument. Was it ever decided that "personal representatives" meant next of kin? When next of kin take as purchasers, you must not look at the statute, but the kindred; so that if there were a child, and ten children of a deceased child, the living child alone would take, and persons of a different degree of relationship would be excluded.

Your Honor's attention has been already called to this in the case of *Price v. Strange*, and we invite your Honor to come to the same conclusion. What is the difference between personal representatives and executors and administrators? Can next of kin be said to be personal representatives? Would next of kin be liable to debts? They may be claimants. In my judgment, the purposes of justice will be best served by holding that the words "personal representatives" are the same as executors and administrators. I also admit, that executors and administrators will take in the characters of executors and administrators, and for the purposes of distribution. It was so defined by Lord Eldon in the case of *Wellman v. Bowring* (a), the case of a surrender of a copyhold to two persons upon certain trusts, and ultimately upon trust to surrender to the use of the executors or administrators of B.: the wife of B. was his administratrix, and she took the fee; but she took it in her character and clothed with her duties of administratrix, and distributable as if personal estate, to be applied in a due course of administration. (b)

(a) 1 Sim. & Stew. 24. and 2 Russell, 374.

(b) The reports cited do not go to this extent, but this case of *Wellman v. Bowring* came on to be heard upon further directions on the 1st February 1830, before the Vice-Chancellor, when it was decided that the administratrix took the equitable fee as part of the personal estate for the benefit of herself and the next of kin, according to the statute for distribution of intestate's estates. — Reg. Lib. 1829. B. p. 1489.

The Plaintiff, being administrator of each of his wives, will also be entitled, if the Court should hold him to take as a purchaser.

1830:
SABERTON
v.
SKRELS.

Mr. Lynch. I appear for the three children of *Elizabeth*. This case is quite different from the case of *Price v. Strange*. I admit the general rule, but there is that in the will which will exclude the husband. The testator gives it to *Elizabeth* for life to the exclusion of her husband, and does not give him any interest. The wife, by the will, has the power to sink it in the purchase of annuities for her own life with the consent of the trustees, and without the privity of the husband, and those annuities are also to be held for the separate use of the wife. Is it not reasonable, therefore, to conclude that the testator meant to exclude the husband except by the execution of the power in the wife? she has not executed it, and the husband is therefore excluded. There is as much in the case before the Court to exclude the administrator as in the case of *Long v. Blackall* (a) to exclude the wife. In *Price v. Strange*, the gift to the legal representative immediately followed the bequest to the child, here a power intervenes. The case of *Bayley v. Wright* (b) is also in favour of my proposition. In the case of *Garrett v. Lord Camden* (c), Lord *Eldon* held that the widow is not one of the next of kin; the husband here cannot take as next of kin; and a husband cannot take as sole next of kin; the intention was to exclude the husband. By the case of *Ripley v. Waterworth* (d) the executor could only take in that character, and as trustee for the residuary legatees. On the same principle my clients are entitled. He may take it, so as he let my clients have it again.

(a) 5 Ves. jun. 494.

(c) 14 Ves. 372.

(b) *Ante*.

(d) 7 Ves. 425. 442.

1830.

SABERTON
v.
SKELLA.

The MASTER of the ROLLS. The Court should not be influenced by the doubtful construction of detached sentences, but proceed upon some settled principle. The words "personal representatives," if taken in the ordinary sense, would be "executors and administrators." The wife would take an absolute interest, and the husband be entitled to administration; he did administer, and became, therefore, the personal representative.

Is there any thing in this will to control the plain ordinary sense of personal representatives?

It is said that the child had the power to purchase an annuity; but that shews an intention that she should take an absolute interest.

I am of opinion that there is nothing in the will to control the ordinary sense of the words "personal representatives."

I shall declare the husband entitled to the portion of the first wife.

With respect to the portion of the second wife, I shall declare it to be a part of her personal estate, and I shall direct an inquiry whether he was legally married to her.

A marriage to the sister of a deceased wife is voidable, and if not made void during her life, it cannot be made void afterwards.

I would declare that the two daughters were absolutely entitled, and that the husband as administrator of his wife *Elizabeth* should have her share, and there should be an inquiry whether he was legally married to

the second sister. As to that there can be but little doubt, the marriage having taken place in *Scotland*,— and so little there constitutes a marriage.

1830.
SABERTON
v.
SKEELS.

If the husband does not establish his title as husband to the second wife, he will not be entitled to all the costs, but if he does, he will be entitled to them.

Decree that the Plaintiff, as the personal representative of his wife *Elizabeth*, is entitled to the legacy of 1000*l.* and interest at four per cent., to be calculated from the end of one year from the death of the testator.

Decree that the Master inquire whether *Harriett* was at the time of her death married to the Plaintiff, and if that inquiry be waived, then that payment be made to the Plaintiff as the personal representative of *Harriett*, of what shall be found to be due in respect of the legacy of 2000*l.* and interest so given and bequeathed to her.

Reg. Lib. 1829. B. p. 2300.

1831.

BETWEEN

ROLLS. JAMES PLATT, - - - Plaintiff;
 February 15. AND
 JOHN M'DOUGALL and JAMES
 M'DOUGALL, - - - Defendants.

*Husband and
 Wife.
 Wife's Prop-
 erty.
 Costs.*

On a marriage the father of the wife purchased 1000*l.* consols, and the same was vested in trustees to pay the dividends to the wife for her life; and then trusts were declared for the children of the marriage, under which the Court had decreed, in a former suit, that the only child of the marriage, a daughter, took a vested interest.

BY indenture bearing date the 15th day of *March* 1760, being the settlement made previous to the marriage of *Josiah Purdew* and *Isabella Wrigglesworth*; it is witnessed, that the sum of 1000*l.* 3 per cent. consols therein recited to have been purchased by the father of the lady as her marriage portion, and invested in the names of *T. Wilson* and *C. Wrigglesworth*, was so purchased, and invested in trust after the marriage, that the trustees should pay unto and permit the wife to receive and take the dividends during her life for her sole and separate use; and in case the husband should die in the lifetime of the wife, then from and after her decease in trust for the children of the marriage as therein mentioned, and in some events in trust to transfer the 1000*l.* and dividends in arrear unto the wife for her own absolute use and benefit. The trusts for the children, and the events on which the trust for the wife depended, were expressed in ambiguous terms, but the effect of them was determined in a former suit, which will be presently stated. The husband died in *March* 1792, in

This daughter, married *J. M.*, and died in the lifetime of the mother, leaving *J. M.* her surviving.

J. M. did not take out administration to the effects of his deceased wife, and afterwards died:

Held, that his executors were entitled to the 1000*l.* consols, and that the representatives of the wife were not entitled.

One of *J. M.*'s executors, who was a defendant, having colluded with the other defendant, the Court gave costs against both of them.

the lifetime of the wife, and leaving a daughter, *Sarah Purdew*, the only issue of the marriage.

1831.

PLATT

v.

M'DOUGALL.

This daughter married Admiral *John M'Dougall*, and died in *April* 1802, in the lifetime of her mother, and leaving her husband her surviving.

Admiral *M'Dougall* did not take out letters of administration to his wife, and died in *November* 1814, having by his will appointed *Mary*, his second wife, during her widowhood, and *James M'Dougall*, surgeon, and the Plaintiff, executors, who duly proved the will. *Mary*, the widow, afterwards married Mr. *De Beauvoir*.

Isabella Purdew died in *September* 1822, having appointed *Wm. Masson* and *Thomas Masson* her executors, who duly proved her will.

John M'Dougall, the son of the Admiral, by *Sarah* his wife, on the 16th of *January* 1823, took out administration to the effects of his mother.

In *January* 1823 the executors of *Isabella Purdew* exhibited their bill against the then trustees of the fund, *Mary M'Dougall*, widow, and the Plaintiff and Defendants to the present suit, stating that, by the death of *Sarah M'Dougall* in the lifetime of *Isabella Purdew*, they were, as the personal representatives of the latter, entitled to the 1000*l.* and dividends discharged from the trusts of the settlement; but it was decreed (see Reg. Lib. 1824. B. p. 2038. *April* 1825.) that *Sarah M'Dougall*, the daughter of *Isabella Purdew*, took a vested interest in the 1000*l.*; and it was decreed that, after payment of cost, the residue of the 1000*l.* and dividends should be transferred to *John M'Dougall*, the personal representative of *Sarah M'Dougall*, and it was so transferred.

1831.
 {
 PLATT
 v.
 M'DOUGALL.

On the 29th of *April* 1829 the Plaintiff filed the bill in this cause claiming the residue which had been transferred to *John M'Dougall*, and that this sum in fact belonged to *James M'Dougall* and Plaintiff as the legal personal representatives of Admiral *M'Dougall*, and that *John M'Dougall* was a mere trustee for *James M'Dougall* and the Plaintiff.

The Defendant, *James M'Dougall*, by his answer said, he did not admit that he and Plaintiff ever were entitled to it as the personal representatives of the Admiral, or that the same was a part of his personal estate, or that the other Defendant was a mere trustee for this Defendant and Plaintiff as such personal representatives; but submitted the same as a question of law to the consideration of the Court. He admitted application by the Plaintiff to join in the suit, but added that he had refused to join and concur, not conceiving it a proper or necessary suit.

John M'Dougall, by his answer, denied the Plaintiff's interest.

Mr. *Pemberton* and Mr. *O. Anderdon*, for *John M'Dougall*, the administrator of his mother.

A husband is entitled to his wife's property only in the character of administrator; and had Admiral *M'Dougall* taken out letters of administration to his deceased wife he might have received the money, subject to the payment of debts; but he did not do so, and the Plaintiff, his personal representative, is not entitled. *John M'Dougall* is in the situation of a trustee, and is at all events entitled to his costs.

Mr. *Swanston*, for Mr. *James M'Dougall*, asked for costs.

The MASTER of the ROLLS decreed, that the Defendant *John M'Dougall* should transfer the stock to Plaintiff and Defendant *James M'Dougall*, as executors of Admiral *M'Dougall*; and his Honor being of opinion that the Defendants had combined in the defence, and that the transfer ought to have been made without suit, gave costs against both of them.

1831.

 PLATT
 v.
 M'DOUGALL.

Reg. Lib. 1830. B. p. 913.

The ATTORNEY-GENERAL, at the Relation of the President and Governors of the Hospital founded at the Costs and Charges of THOMAS GUY, Esquire, v. The Governors of CHRIST'S HOSPITAL.

WESTMINSTER
 HALL.
 June 22.

THOMAS GUY, by his will, dated 4th September 1724, gave and devised as follows: —

Gift upon condition to a charity.

Acceptance.

“Item, I give to the president and governors of *Christ's Hospital*, in *London*, and their successors for ever, one annuity or yearly sum of 400*l.*, to be paid by my said executors till such intended corporation (alluding to a charter of incorporation for *Guy's Hospital*) shall be obtained and take effect, and then by such intended corporation, or their treasurer for the time being; provided nevertheless, and upon this condition, that my said executors and such intended corporation, and their

In 1724 a testator gave 400*l.* per annum to the governors of *Christ's Hospital*, upon condition that they received four boys or girls annually, to be nominated by the relators.

They received the income and the nominees until 1827, when they passed a resolution that they would no longer receive them:

Held, that this was a gift upon condition, and having accepted the gift, they were bound to the condition.

1830.

ATTORNEY-
GENERAL


v.
CHRIST'S
HOSPITAL

successors, shall have liberty from time to time to nominate and put into *Christ's Hospital* aforesaid yearly and every year for ever at *Easter*, or within six months after, such four poor boys or girls, whether orphans or otherwise, or the children of freemen of the city of *London*, or unfreemen not less than seven, or more than ten years of age, as my said executors or the said intended corporation, and their successors, shall think fit, with preference to my relations as often as any such shall offer themselves, who shall be received into the said hospital, and have the maintenance and education thereof, and be continued therein in like manner as other children are maintained and educated in the said hospital; and my will is in that case, and as often as the said president and governors of *Christ's Hospital* shall neglect or refuse to take in the said number of boys and girls to them nominated and qualified as aforesaid, it shall be lawful for my said executors and the said intended corporation, and they are hereby directed and desired, to apply the said annual sum of 400*l.* to the education and maintenance of such four poor children as aforesaid in such other school or place, and in such other manner, as they shall think fit."

From the death of the testator the governors of *Christ's Hospital* received the annuity and four boys annually until 1827, when they passed a resolution that they would do so no longer.

Mr. *Pemberton* and Mr. *Wigram* for the relators. The question is, whether the governors of *Christ's Hospital* having accepted an annuity of 400*l.* a year given by the will of *Guy*, they are not now bound by the acceptance and to the conditions which accompanied the gift?

The governors of *Christ's Hospital* have power to accept gifts of this description, and that is not now in dispute between us. They say they were to be at liberty under a clause in the will to renounce the bequest; but the construction we put upon it is consistent with the plain intention. An authority is given to the executors, but still holding *Christ's Hospital* to their engagement.

1830.

 ATTORNEY-
 GENERAL
 v.
 CHRIST'S
 HOSPITAL.

By accepting the annuity the governors of *Christ's Hospital* are bound to perform the conditions.

Mr. *Bickersteth* and Mr. *Phillimore* for the governors of *Christ's Hospital*. This is a case in which a yearly sum of money is given upon a yearly condition. Four boys a year, in six years, the period of education, make twenty-four, which is the number the hospital has to educate under this bequest. The testator contemplated that the governors might at some future time refuse to take in the number of boys, and provides accordingly. It is found that the 400*l.* a year is not sufficient to maintain twenty-four boys, 16*l.* 3*s.* 4*d.* only each, and consequently the funds of the charity are affected by this gift. The funds, destined to other objects, must be withdrawn for the maintenance of these boys and girls. It is become an incumbrance upon the other funds, and the governors have refused to allow a continuance of it unless it shall be decreed against them.

The MASTER of the ROLLS. The question here is, whether this is a gift of this annual sum, so long as they shall receive the four children, or a gift upon condition that they receive four children yearly?

It is clear that the latter is the true construction; and having accepted it, they are bound to the condition.

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 ATTORNEY-
 GENERAL
 v.
 CHRIST'S
 HOSPITAL.

The proviso only means this, that the testator would give a collateral remedy to apply the fund to the education of the children in case the governors of *Christ's Hospital* should omit to receive them, but that does not release *Christ's Hospital* from their acceptance for ever of this annual sum of 400*l*.

Declare that the annuity has been accepted; that it has become part of the assets; and that the Defendants are not now at liberty to reject the annuity.

The governors to receive four children for each of the preceding years 1828, 1829, and 1830, and four children each year hereafter, upon due payment of the annuity.

Reg. Lib. 1829. A. p. 2521.

ROLLS.

Tuesday,
 March 2.

GREEN v. SPICER.

Will, con-
 struction of.
 Insolvent
 Debtor.

A testator
 gave a dwell-
 ing-house and
 a piece of land
 to trustees

upon trust, to receive the rents and apply the same for the board, lodging, maintenance, support, and benefit of the testator's son, as they should think proper, for his life; and the application thereof for the benefit of the son, was to be at the entire discretion of the trustees; and the son was not to have the power in any way to sell, mortgage, or anticipate the rents. The son took the benefit of the act for the relief of insolvent debtors. The Plaintiffs were his assignees:

The Court decreed a conveyance to the Plaintiffs. Trustees to retain their costs as between solicitor and client.

ROBERT PINNING, by his will bearing date the 17th day of October 1815, gave a dwelling-house and piece of land unto and to the use of *John Spicer* and *Daniel Robinson*, two of the Defendants, their heirs and assigns for ever, upon trust, to let and manage the same and receive the rents, issues, and profits thereof,

and apply the same rents, issues, and profits, to or for the board, lodging, maintenance, support, and benefit of the testator's son, *Robert Pinning* the younger, at such times and in such manner as they should think proper for and during the term of his natural life; and it was thereby declared to be the testator's wish, that the application of the rents, issues, and profits, for the benefit of his said son, might be at the entire discretion of the said *John Spicer* and *Daniel Robinson*, and the survivor of them, and the heirs and assigns of such survivor; and that his, said testator's, son should not have any power to sell or mortgage, or anticipate in any way the same rents, issues, and profits, or any rents, issues, and profits, dividends or interest derived under the said testator's will.

1830.

GREEN
v.
SPICER.

The testator died in 1826; and his son in 1827 took the benefit of the act for the relief of insolvent debtors in *England*. The Plaintiffs are his assignees.

The bill charged that the Defendant, *Robert Pinning* the younger, notwithstanding his insolvency, claimed to be beneficially entitled to the rents and profits of the said hereditaments; and that, under the will, they were not capable of being alienated or affected by any act of his own.

The bill prayed that the Plaintiffs, as such assignees, might be declared entitled to the rents and profits of the hereditaments for the life of the said *Robert Pinning* the younger.

The Defendants, *Spicer* and *Robinson*, in their answer, said, that they were advised that it was the intention of the testator that *Robert Pinning* the younger should have

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GREEN
v.
SPICER.

no controul whatever over the rents and profits; and that they should receive the same, and apply them, as in their discretion seemed fit, for the board and lodging, maintenance, support, and benefit of *Robert Pinning* the younger.

R. Pinning the younger, by his answer, insisted upon that construction and effect of the will.

Mr. *Bickersteth* for the Plaintiffs, cited *Brandon v. Robinson* (a), and *Brandon v. Robinson and Davies*. (b)

Mr. *Agar* and Mr. *Parker*, for the Defendants the trustees, cited *Thomas v. Freeman*. (c)

The MASTER of the ROLLS decreed that the Plaintiffs, as assignees of *Robert Pinning* the younger, the insolvent, were entitled to the rents and profits during the life of the insolvent, and that the Defendants, the trustees, should pay the same to the Plaintiffs, after deducting their costs, to be taxed as between solicitor and client.

Reg. Lib. 1829. A. p. 1178.

(a) 18 Ves. 429.

(b) *Rose's Bankrupt Cases*, 197.

(c) 2 Vern. 565.

1830.

BETWEEN

WESTMINSTER
HALL.

WILLIAM KINSMAN, - - Plaintiff; June 17.

AND

SIMON KINSMAN, WILLIAM KINSMAN his
Son, and JOHN INGLETT FORTESCUE,
Esq., - - - Defendants.*WILLIAM KINSMAN*, by his will dated the 16th *Lis pendens.*

January 1778, devised all his messuages, lands, and hereditaments called *Higher or Parish Hay, Sandy Park, and Quarry Park*, in *Lamerton* in *Devonshire*, unto *John Rowe* and *John Kinsman* his brother, and their heirs, in trust for and to the use and behoof of his nephew *William Kinsman* (the father of the Plaintiff), the eldest son of his brother *John Kinsman*, for life; remainder to trustees, to preserve contingent remainders; remainder to the first son of the body of the said *William Kinsman* his nephew, and the heirs male of his body; remainder to the second and other sons successively in tail male; remainder to the right heirs of his brother *John Kinsman*.

A testator gave lands to *A.* in strict settlement, and a manor to *B.* in strict settlement. On his death a creditor's bill was brought for the administration of assets, and it appearing that the testator owed a debt on mortgage, and some specialties, the Master was directed to

ascertain what proportion the properties contained in the several devises ought to bear, and to raise the amount by sale or mortgage.

The Master sold the manor and lands. The title to the lands was completed, and the purchase money paid, but no good title could be made to the manor. The report was confirmed in 1798. *B.* continued in the possession of the manor, and never paid the contribution; and in 1824 he and his eldest son having suffered a recovery, sold it to *J. I. F.* In 1825 *A.* died, and in the same year his eldest son, tenant in tail, filed his bill against *B.*, and his eldest son, and the purchaser. Decreed, that this was a purchase *pendente lite*; and the contribution reported by the Master to be paid from the estate devised to *B.*, with interest and costs, was ordered to be raised by sale and mortgage, and paid to the Plaintiff.

1830.
 KINSMAN
 v.
 KINSMAN.

The testator, by his will, also devised his manor of *Northcombe*, in *Bratton Clovelly*, in *Devonshire*, together with 5s. yearly, payable out of the manor of *Shugston* unto the same trustees, in trust to and for the use of his nephew, the Defendant *Simon Kinsman*, the third son of testator's brother, *John Kinsman*, for life; remainder to trustees to preserve contingent remainders, with remainder to the first and every other son of the body of *Simon Kinsman*, and the heirs male of the bodies of such first and other sons respectively, severally and successively in tail male; remainder to the right heirs of his brother *John Kinsman* for ever. And the testator thereby also gave, devised, and bequeathed all his goods and chattels, and all other his real, personal, and testamentary estate unto his nephew *Wm. Kinsman*, his heirs, executors, and administrators, and appointed him executor of his will.

The testator died on the 2d of *May* 1780, and his will was proved by the executor; and shortly after his death a creditor's bill was filed for the administration of the real and personal estate of the testator, in which his said nephews, *William Kinsman* and *Simon Kinsman*, and also the Plaintiff first tenant in tail of the *Lamerton* estates; and the Defendant *William Kinsman*, son of *Simon Kinsman*, and first tenant in tail of the manor of *Northcombe*, and *John Carpenter* a mortgagee, and other necessary parties, were Defendants. The cause was heard at the Rolls on the 23d of *May* 1792, when the usual accounts were directed to be taken, and advertisements published; and it was ordered, that in case the testator's personal estate should not be sufficient for payment of all his debts, that the deficiency as to his specialty debts ought to be raised and made good out of the testator's real estate, which passed by his will, in proportion to the value of the said real estates respectively, and the Master was to settle the proportions

in which the said estates ought to contribute, to make good the deficiency of the personal estate for the payment of specialty debts; and such deficiency to be raised by sale or mortgage of the said estates respectively, according to such apportionment. The estate devised by the testator to his nephew *Wm. Kinsman* was in mortgage to the Defendant *Carpenter*, and was valued at 2060*l.*; the other estate devised to *Simon Kinsman* was valued at 1491*l.* 14*s.* At an auction the former was sold for 3400*l.*, and the latter for 1687*l.* 12*s.* The 3400*l.* was paid into Court, and the lands conveyed by the mortgagee and *Wm. Kinsman*, the tenant for life, in *February* 1798; but the Plaintiff being then an infant, the Master reported that he ought to be directed to join in proper conveyances and recoveries to be suffered upon his attaining twenty-one years; but he reported that a good title could not be made to the manor of *Northcombe* devised to *Simon* and his sons, and therefore he did not settle the proportions of the contributions. This report was confirmed on the 20th *February* 1798, and on the 13th *March* 1798; when the cause came on upon further directions, it was ordered that the costs should be paid, and then the sum of 1099*l.* 2*s.* 5*d.* to the mortgagee for his principal interest and costs, and several other sums. By a subsequent report, dated 7th of *June* 1798, the Master found that the manor of *Northcombe* ought to contribute and bear the sum of 873*l.* 1*s.* 8*d.*, as the proportion, with the *Lamerton* estate which had been sold, of the several sums by the order directed to be paid out of the 3400*l.*

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KINSMAN
v.
KINSMAN.

The report was confirmed on the 13th *June* 1798.

William Kinsman, the father, died in *February* 1825, leaving Plaintiff, his eldest son, and first tenant in tail of the estate sold. The Plaintiff took out administration

1830.
KINSMAN
v.
KINSMAN.

to the effects of his father. The Plaintiff charged that his father was a pauper, and was unable to raise money to prosecute his claim, and that Plaintiff was also a labouring man in indigent circumstances, and was ignorant of his right until after the decease of his father, but upon being made acquainted with it, he took steps to enforce it. This charge was supported by evidence. In the mean time, in the year 1824, *Simon Kinsman*, and his son, sold the manor of *Northcombe* to the Defendant, *John Inglett Fortescue*, for 2700*l.* The bill prayed that the Defendants might pay the sum of 873*l.* 1*s.* 8*d.* and interest, or that the same might be raised by sale or mortgage.

The Defendants, *Simon Kinsman* and *William* his son, submitted that this was a stale demand, and ought to be considered satisfied after such a lapse of time and such laches; and they insisted on the benefit of the statute of limitations of King *James I.*, and the analogy to that statute adopted by courts of equity.

The Defendant *Fortescue*, by his plea and answer, insisted that he was a purchaser for a valuable consideration, and denied notice of the claim of the Plaintiff and of the decree.

A witness proved a conversation with Defendants, *Simon* and *William Kinsman*, in 1818, when one of the Defendants stated that a claim had been made to the *Northcombe* estate, but that the claimant would never be able to make a title to it, because the deeds had been buried in a crock; and another witness proved that he had frequently seen them at their solicitor's, and that about two years since he, witness, had a conversation with that solicitor, when the latter said that he had recommended *Simon Kinsman* to settle with the complainant before the estate of *Northcombe* was sold.

Mr. *Pemberton* and Mr. *Daniel* for Plaintiff.

1830.

KINSMAN
v.
KINSMAN.

The estate devised to *Simon Kinsman* not having been sold remained liable. He secreted the title-deeds to prevent the estate being sold. The person entitled for life became a pauper, and did not die until 1825, when his eldest son, the Plaintiff, tenant in tail, became entitled to this sum of money. A decree, which is a final decree in a cause, is not notice to a purchaser, but the pendency of a suit is notice to a purchaser. *Worsley v. Earl of Scarborough* (a), *Gove v. Stackpoole*. (b) And there being in this case a suit pending, that suit was notice to Mr. *Fortescue* the purchaser.

Mr. *Tinney* and Mr. *Parker* for *Simon* and *William Kinsman*.

Mr. *Bickersteth* and Mr. *Kindersley* for Mr. *Fortescue*.

The MASTER of the ROLLS.

I shall charge the estate, and those who purchased the estate *lite pendente* are liable; this is plainly *lite pendente*.

Decree that the Master take an account of what is due to the Plaintiff in respect of the said sum of 879*l.* 1*s.* 8*d.*, and that he calculate interest at 4*l.* per cent. from the 7th *June* 1798, the date of the Master's report; and that the said sum and interest, with costs, be raised out of the estate by sale or mortgage, and paid to the Plaintiff.

Reg. Lib. 1830. A. p. 100.

(a) 3 *Atk.* 392.

(b) 1 *Dowd.* 18.

1830.

WESTMINSTER
HALL.
June 28.

ELIZA FELLOWES MARY OWEN, by ROBERT
HENNESSY MOORE OGLE, her Brother and
next Friend, - - - Plaintiff;

AND

JOHN THOMAS LYS, WILLIAM JAMES
PISTOR, and SAMUEL OWEN, - Defendants.

*Married Wo-
man.
Separate Pro-
perty.
Trustees.*

Bequest to a
married wo-
man to her
separate use.
The Court
would not
order payment
into her
hands, but
ordered the
legacy to be
carried to her
account, with
liberty to her
to apply.

THE Rev. *George Ogle*, the uncle of the Plaintiff, by
his last will and testament in writing, dated 18th
November 1823, after giving divers specific and pecu-
niary legacies, gave and bequeathed, among other
things, to each of the children of his late brother
Colonel *Robert Ogle*, viz. to *Emma Powles* (wife of
John Diston Powles), *Sophia Ogle*, *Robert Hennessy
Moore Ogle*, *Sydney Mary Crawford Ogle*, *Sarah Ann
Ogle*, and the Plaintiff *Eliza Fellowes Mary Owen* (then
Eliza Fellowes Mary Ogle), the sum of 1000*l*. And
the testator declared his will to be that all the bequests
therein, or any codicil or codicils thereto, made or to be
made in favour of the said *Emma Powles*, *Sophia Ogle*,
Sydney Mary Crawford Ogle, *Sarah Ann Ogle*, and
Eliza Fellowes Mary Ogle, should be free from the
debts, controul, and engagements of their or either
of their present or future husband or husbands, and to
and for their own respective sole and separate use and
benefit absolutely, notwithstanding coverture; and as
to all the rest, residue, and remainder of his estate and
effects whatsoever and wheresoever, and of what nature,
kind, or quality soever not therein and thereby disposed
of, he gave, devised, and bequeathed the same, and
each and every part thereof, unto and amongst the said
Emma Powles, *Sophia Ogle*, *Robert Hennessy Moore*

Ogle, Sydney Mary Crawford Ogle, Sarah Ann Ogle, and the Plaintiff Eliza Fellowes Mary Owen, their heirs, executors, administrators, and assigns, in equal shares and proportions, as tenants in common, and not as joint tenants. And the testator thereby appointed the Defendants, *John Thomas Lys* and *William James Pistor*, executors of his will.

1890.

OWEN

v.

LYS.

The Plaintiff attained her age of twenty-one years on the 21st *September* 1825, and subsequently to the death of the testator, on the 12th *August* 1828, married the Defendant *Samuel Owen*, and the bill stated that the bequests made by the will to the Plaintiff being made to and for her sole and separate use and benefit, notwithstanding coverture, no settlement thereof was executed prior to or subsequent to the marriage. The Plaintiff's legacy of 1000*l.* was paid.

The Defendants realised 14,500*l.* as the residue. And the bill prayed that the Defendants *Lys* and *Pistor* might be decreed by the Court to pay to the Plaintiff, for her sole and separate use, one sixth part or share of the sum of 14,500*l.* admitted by them to be in their hands; and might be decreed to pay to the Plaintiff, for her sole and separate use, her sixth part or share of the residue of the testator's estate outstanding and unreceived as and when the same should be collected in and received by the Defendants *Lys* and *Pistor*; and that the Defendants *Lys* and *Pistor* might pay the costs of the suit.

The Defendants, the trustees, submitted to the Court, whether the Plaintiff was entitled to receive her share without any settlement thereof being made upon her.

Mr. *Treslove* and Mr. *Whitmarsh* for the Plaintiff.

1830.

OWEN
v.
LYB.

Mr. Tinney for the trustees.

The MASTER of the ROLLS. Can an executor safely pay this money into the hands of a married lady when it is given to her separate use? The Court does not do that. The Court will throw a protection around her. Let it be carried to her account, with liberty to her to apply. We must give her the opportunity of deliberating by transferring it to her account.

Costs of all parties to be paid out of her share of the fund.

Decree that the Defendants transfer into the name and with the privity of the Accountant-general, in trust in this cause, "the separate account of the Plaintiff *Eliza Fellowes Mary Owen*," the sum of 3411*l.* 5*s.* 3*l.* 10*s.* per cent. Reduced annuities in respect of the Plaintiff's share of the residuary personal estate of the testator; and any of the parties are to be at liberty to apply.

Reg. Lib. 1829. B. p. 1734.

1830.

BANKS v. SLADEN.

ROLLS.

February 18.

JOSEPH SLADEN, Esq., by his will, bearing date 14th October 1822, gave unto his executors the sum of 12,500*l.* 4*l.* per cent. Bank annuities, upon trust, to stand possessed thereof, and to invest the interest, dividends, and yearly proceeds, as the same should from time to time become due, in accumulation of the capital, during the natural life of his daughter *Sarah*, the wife of *Lawrence Banks*, and after her decease, upon trust, to transfer the principal to her children, begotten or to be begotten, equally, as they should respectively attain the age of twenty-five years; and the dividends of the share of such children as should be under the age of twenty-five at the decease of his daughter should accumulate until such children's shares respectively became payable, with a substitution of the issue of such children as should die in the daughter's lifetime; and cross remainders as between such children who should die without issue; with an ultimate limitation over in the event of his daughter dying without leaving issue.

The testator likewise gave to his executors the sum of 10,000*l.* 4*l.* per cent. Bank annuities, in like manner, with respect to his daughter *Caroline Matilda*, the wife of *William Smith*, and her children.

The testator, at the date of his will, was possessed of 59,650*l.*, 4*l.* per cent. Bank annuities.

daughters, and until their children respectively should attain twenty-five, when the principal should be transferred to the children, the Court directed the dividends to accumulate for twenty-one years, if the daughter should so long live; but the Court would not decide on the question of remoteness, as if the daughter left no issue the question would not arise, and the Court will not decide an hypothetical case.

*Legacy.**Public Funds.**Accumulation.**Remoteness.*

A. by his will, in October 1822, gave

12,500*l.* and 10,000*l.* 4*l.* per cent. Bank annuities.

There were at that time two stocks at 4*l.* per cent., and the testator had monies in each. One of those stocks was prior to his death reduced to 3*l.* 10*s.* per cent.:

Held, that the legatees were entitled to have the respective amounts in the other 4*l.* per cent. still existing.

The testator having declared that the dividends should accumulate during the life of his

1830.

BANKS

v.

SLADEN.

By act 5 G. 4., entitled "An Act for transferring several annuities of 4*l.* per cent. per annum into annuities of 3*l.* 10*s.* per cent. per annum," it was enacted, that persons possessed of 4*l.* per cent. annuities might, for every 100*l.* receive 100*l.* 3*l.* 10*s.* per cent.

The testator in his lifetime assented to the transfer.

The bill stated that there were other 4*l.* per cent. annuities, and prayed that a sufficient part of the testator's personal estate might be invested in the purchase of 12,500*l.* and 10,000*l.* 4*l.* per cent. Bank annuities, upon the trusts of the will.

The Defendants stated in their answer, that at the date of the will there was not any other stock called the 4*l.* per cent. Bank annuities save the stock in which the testator was entitled, at the time of his will, to the sum of 59,650*l.*, but that at the time of the answer there was no stock known by that name, and the only stocks which yielded a dividend of 4*l.* per cent. were either the New 4*l.* per cent. annuities, or the 4*l.* per cent. annuities 1826; and the Defendants submitted, that the legacies would be satisfied by a transfer of 12,500*l.* and 10,000*l.* 3*l.* 10*s.* per cent. annuities.

Testator, at the time of his death, had 76,720*l.* 3*l.* 10*s.* per cent. annuities, converted from 4*l.* per cent. annuities. He also died possessed of 4725*l.* New 4*l.* per cent. annuities, derived from 4500*l.* Navy 5*l.* per cent. annuities, at the reduction of the interest in that stock in *July* 1822, by the government giving 105*l.* New 4*l.* per cent. for every 100*l.* Navy 5*l.* per cent. (a)

(a) See act 3 G. 4. c. 9. passed 15th *March* 1822.

Mr. *Preston* and Mr. *G. Warry* for the Plaintiff.

1830.

BANKS
v.
SLADEN.

This is not a specific legacy, but a legacy of quantity ; there are 4*l.* per cent. annuities now existing, and we claim to be satisfied in that stock. The act changed the 4*l.* per cents. to 3*l.* 10*s.* per cents., and had this been a specific legacy we should have been entitled to the amount of the legacy in the 3*l.* 10*s.* per cents. *Swinburn* (a) says that a legacy must be answered out of any fund capable of answering it. A case decided by Lord *Eldon*, *Attorney-General v. Scriven*, will probably be cited on the other side : there the testator bequeathed “ all the residue of my 4*l.* per cent. Consolidated annuities at the Bank of *England* at my decease.” Beyond all doubt that was a specific legacy. The Chancellor decided that the legacy was to be satisfied out of those 4*l.* per cents. only which would have existed had not the 5*l.* per cents. been reduced to 4*l.* per cents., but not to be increased by the reduction ; and held that all the old 4*l.* per cent. annuities passed by the will, but not the new 4*l.* per cents.

Swinburn says, “ that albeit the testator have no such thing of his own as is bequeathed, yet nevertheless the legacy is good in law.” (b) The legacy there alluded to, as here, was not specific, but of quantity, as a horse, or a yoke of oxen ; and *Swinburn* says, that the legacy is good in law, though the testator have neither horse nor ox of his own.

It has been decreed, that when the testator gives stock which he does not possess, the legatee is entitled to have stock purchased. (c) This is a legacy of quantity.

(a) Vol. i. 246.

(b) 1 *Swin.* 246. and 5 *Swin.* 922.

(c) *Bronsdon v. Winter*, *Amb.* 57.

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SLADEN.

In this case there are 4*l.* per cent. annuities, and the executors should be ordered to provide for the legacy out of them.

The testator's intentions will be best answered by ordering the legacies to be paid in the present 4*l.* per cents., for the testator certainly looked to income; but if the Court should not think so, then we contend we are clearly entitled to have them satisfied out of the 3*l.* 10*s.* per cents. The act of parliament (*a*) provides for specific legacies, but not for legacies of quantity. We admit that the executors may pay us in either of the 4*l.* per cents. now existing (*b*): whoever has to do the first act has the right of election. It is a general principle, that a person who has to make the transfer has his election. (*c*)

Mr. *Bickersteth* for the executors. The thing supposed to be given must be capable of being procured: at the time of the death of the testator there was no such thing as he had given, nor can any such thing be obtained.

In *Fonnerean v. Poyntz* (*d*) before Lord *Thurlow*, his Lordship said, "That if it had been doubtful out of what fund the legacy was to arise, that would have been matter to explain by evidence, in order to see whether the description applies aptly or not." And in *Colpoys v. Colpoys* (*e*), the language of the bequest not applying

(*a*) 5 *G. 4. c. 11. s. 20.*

(*b*) At the time of this discussion there were in fact two 4*l.* per cent. stocks; one, that reduced from the 5*l.* per cents., and since reduced to 3*l.* 10*s.* per cents. by an act passed 5*d May* 1830; and the other 4*l.* per cents. 1826, created by funding Exchequer bills by the act 7 *G. 4. c. 39.*, and which cannot be redeemed until after 5*th April* 1833.

(*c*) *Fontaine v. Tyler*, 9 *Price*, 94.

(*d*) 1 *B. C. C.* 472.

(*e*) Before Sir *T. Plummer*, *Jacob*, 451.

strictly, and therefore being capable of two interpretations, Sir *T. Plumer* held that parol evidence might be let in.

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v.
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The authority of both these cases has been recognized in the manuscript case cited of the *Attorney-General v. Scriven*.

The testator gave 12,500*l.* 4*l.* per cent. annuities, and he must have meant the 4*l.* per cents. then existing; no such stock can now be procured: then it is said the legatees are entitled to something else; but there is nothing in the act which relates to the will of a person living. (a)

Mr. *Heater*, also, for the executors.

It is a specific legacy; it is specific with regard to its description, and where there is a latent ambiguity, parol evidence is admissible to prove the identity, *Beachcroft v. Beachcroft* (b): the words of the will are only applicable to the stock existing at the time. It was said by the Court in *Sandford v. Raiks* (c), that where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent but necessary to admit extrinsic evidence to ascertain the fact, and through that medium to ascertain the subject of the devise.

In *Doe dem. Jersey v. Smith* (d), a case in the House of Lords, Mr. Justice *Bayley* says, "The evidence here is not to produce a construction against the natural meaning of the words; but because an indefinite expression is used capable of being satisfied in more ways than one,

(a) See 20th section of the act.

(b) 1 *Mad. Rep.* 480.

(c) 1 *Mer.* 655.

(d) 2 *Brod. & Bingh.* 555.

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and I look to the state of the property at the time, to see whether it would assist in judging what was the meaning." The legacy cannot be satisfied out of the new 4 per cents.; that not being a fund which the testator contemplated by his will, the legacies would equally not be satisfied by a purchase in the $3\frac{1}{2}$ per cents.; the act applies only to wills partly performed, it does not apply to those wills which had not been called into operation.

The MASTER of the ROLLS. At the time the testator made his will there were two funds known by the name of the 4 per cent. Bank annuities — one of 1780, and the other as the new 4 per cent. annuities; one of them having been created by the conversion of 5 per cents. to 4 per cents. Had they remained in the same state, the executors would have provided for the legacies in the one fund or the other; for the only object the testator had was with respect to the income, and it would be indifferent to the intention of the testator whether the investment was in the one fund or the other. Now one of these funds, that of 1780, is since gone, it having been converted into $3\frac{1}{2}$ per cents.; but the destruction of that fund does not prevent the executors from making the investment in the remaining fund.

Decree that the investment of a sufficient part of the personal estate of the testator in the purchase of 12,500*l.* 4 per cent. Bank annuities and 10,000*l.* 4 per cent. Bank annuities be made in the fund called New 4 per cent. annuities (*a*), and let the executors in-

(*a*) This, of course, means the 4 per cents. that were reduced from the 5 per cents., and which since the decree have been reduced to $3\frac{1}{2}$ per cent., and not the 4 per cents. 1836.

vest a sufficient part of the testator's personal estate in such purchase in their joint names.

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v.
SLADEN.

There was another and very important question in the case, whether the trusts for the children of the daughter were not void for remoteness, but as to that his Honor would not decide; for if the daughters left no issue, the question might not arise, and he would not decide upon an hypothetical case.

But he decreed that the dividends of the 12,500*l.*, when purchased, should accumulate in the same stock for twenty-one years from the death of the testator, if *Sarah Banks* should so long live; and upon her death, or the expiration of twenty-one years, any of the parties interested in the said sum of 12,500*l.* were to be at liberty to apply; a similar decree, *mutatis mutandis*, was made as to the 10,000*l.* (a)

Reg. Lib. 1829. A. p. 806.

(a) The *Thelluson* Act, for restraining accumulations to twenty-one years, directs that the rents and produce of property directed to be accumulated shall so long as the same shall be directed to be accumulated contrary to the provisions of that act go to the person who would have been entitled if such accumulation had not been directed.

In the case of *Griffiths and Vere* (9 Ves. 127.), a testatrix had directed an accumulation for a period which might extend beyond the time limited by the act, and it was held to be good *pro tanto*, and that during the period of twenty-one years the rents and profits were well directed to accumulate.

1830.

WESTMINSTER
HALL.

BOURN v. GIBBS.

June 17.

Gift to a wife,
and if she
make no dis-
position of it,
then over:
Held, an
absolute gift.

RICHARD CLARINGBOULD by his will gave and bequeathed as follows: — “ Also I give and bequeath the sum of 200*l.* stock, residue of my capital stock in the old joint stock *South Sea* annuities, and also the sum of 200*l.* capital stock in the three *per centum* Consolidated Bank annuities; and also all the rest and residue of my goods, chattels, effects, debts due and owing to me, money securities for money, money in any of the public stocks or funds of the kingdom; and all other my personal estate whatsoever and where-soever, and of what kind or nature soever the same may be at the time of my decease, (from and after the pay-ment of all my just debts, funeral expences, the legacies before mentioned, and legacy of 5*l.* hereinafter be-queathed to my executor *John May* hereinafter men-tioned, and the charges of proving and executing this my will,) unto my said wife *Elizabeth Claringbould*, to and for her own use and benefit; and to be at her own absolute disposal, and free from any controul what-soever: provided nevertheless, that if my said wife shall make no disposition thereof, either by expenditure, sale, transfer, assignment, gift, or otherwise, in her lifetime, or by her last will and testament, then I direct that the said several sums of 200*l.* of lawful money, and 1000*l.* stock in the old *South Sea* annuities, and 200*l.* stock in the three *per centum* Consolidated Bank annuities, and residuary personal estate, after such payments thereout as aforesaid, or such part thereof as shall remain undisposed of as aforesaid, shall imme-diately after my said wife’s decease go to, and I accord-ingly give and bequeath the same unto my said two nephews *Peter John Saunders* and *Thomas Saunders*, and my said niece *Ann Gibbs*, equally to be divided between

them, share and share alike, and to their several and respective executors, administrators, and assigns; and I make, constitute, and appoint my said wife *Elizabeth Claringbould*, and Mr. *John May* of Deal, in the county of Kent, gentleman, executors of this my last will and testament." The question for decision in this cause was, whether the wife took an absolute interest under the will?

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BOURN
v.
GIBBS.

Mr. *Bickersteth* and Mr. *Barber* contended that this was an absolute gift, and cited the *Attorney-General v. Hall* (a), *Bland v. Bland* (b), *Bull v. Kingston*. (c)

Mr. *Pemberton* said he did not deny that the widow had the power to make herself the absolute owner. She did not dispose of it by her will, or otherwise. The only question was, whether the widow had assumed to herself the right of ownership? There was nothing in this case to shew that she had so done, and, consequently, the bequest over was good.

The MASTER of the ROLLS. This is an absolute gift. (d)
Reg. Lib. 1829. A. p. 2182.

(a) *Fitzgibbon's Reports*, 314.

(b) 2 Cox, 549.

(c) 1 *Merivale*, 314.

(d) This decision seems to have been made on the authority of the case of the *Attorney-General on the relation of the Goldsmiths' Company* against *Hall*, as that case is reported by the reporter referred to; but his report of that case should be read with a note in the second volume of *Equity Cases Abridged*, which refers to a manuscript report of the case; and it seems that *Francis Hall* suffered a recovery of the freehold property, declared the uses to himself in fee, and then by his will devised it to his wife, and appointed her executrix. The recovery, although it could only affect the freehold, yet shewed an *evident intention to acquire the dominion* of all the property devised by the father's will. (See *Tamlyn on Terms of Years and other Chattels*, title Executory Bequests, p. 86.)

However, the three Judges who decided this case appear to have decided without reference to these circumstances. Their judgment is thus stated in the note:—

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BOURN
&
GIBBS.June 5. 1751. — *King C., Jekyll Master of the Rolls, Reynold C. B.*

In regard the ownership and property of the personal estate was vested in *F. Hall*, and not the use only; the limitation to the Company is void; it is giving a man an estate in money to spend, and limiting over to another what does not happen to be spent; and therefore the information was dismissed.

In the case of *Strange v. Barnard*, (2 Br. Ch. Ca. 586.) there was also evidence of intention. In that case, after a devise, under a power, of 300*l.* by a wife to her husband, and at his death the remaining part of what is left, that he does not want for his wants and use, to go over. The husband administered to his wife's effects, and called upon the trustees to transfer the 300*l.* to him, and it was decreed accordingly. There was then intendment, and it was carried into execution.

In *Upwell v. Halsey*, (1 P. W. Rep. 651.) a testator directed that such part of his personal estate as his wife should leave of her subsistence should return to his sister. The widow married again, and it was argued that the marriage was a gift in law, but the bequest over was held good.

WESTMINSTER
HALL.
May 5.

BETWEEN

PHILIP DAVIES, - - - Plaintiff;

AND

THOMAS THOMAS and ELIZABETH his Wife,
Defendants.*Condition.*

The Plaintiff made a mortgage to the first husband of the female Defendant, who after that husband's

death lent the Plaintiff the sum of 300*l.*; subsequently she bought the estate for an additional 400*l.* Soon afterwards she granted a lease to the Plaintiff, and signed an agreement indorsed on the lease, that the Plaintiff might repurchase within five years, paying the rent as it became due. The rent was not regularly paid, in some instances not until distresses were levied: Held, that this was not a case of forfeiture, but of particular indulgence; from all the evidence the Court was of opinion that the transactions were not contemporaneous, and the Court held, that the terms not having been fulfilled the bill must be dismissed, and with costs.

PLAINTIFF being seised in fee of the lands in question, called *Retorno*, by indentures of lease and release, dated the 3d and 4th February 1818, conveyed the same unto *Henry Twynning*, his heirs and assigns, by way of mortgage, to secure 1200*l.* and interest.

The mortgagee subsequently by his will gave his estate and interest in the mortgaged hereditaments, and the money due on the mortgage, unto *Elizabeth Twynning*, his wife, and appointed her his executrix. Afterwards, in 1820, the Plaintiff became further indebted to Mrs. *Twynning* in the sum of 200*l.*, and executed to her a warrant of attorney to confess judgment.

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v.
THOMAS.

By indentures of lease and release of the 28th and 29th *September* 1820, the Plaintiff conveyed the property to Mrs. *Twynning*. The consideration expressed was 1800*l.*, which included the two sums previously due.

By an indenture of demise, dated the 1st day of *January* 1821, Mrs. *Twynning* demised the land to the Plaintiff for a term of ninety-nine years, determinable on the deaths of Plaintiff and his wife and son, and the survivor of them, at the yearly rent of 105*l.*, payable half-yearly; and on such lease an agreement was indorsed, that in case the Plaintiff should pay the half-year's rent due the 25th *March* on or before the 4th day of *June* then next following, and the half-year's rent due on the 29th day of *September* on or before the 26th day of *October* then next following in every year, for the term of five years from the date thereof, if the lease should so long exist, then and upon the sole condition of the due payment of the rent half-yearly within the respective days aforesaid, Mrs. *Twynning* thereby agreed to sell *Retorno* to the Plaintiff, in case he should be desirous of purchasing the same, at any time within five years from the date thereof, but not afterwards, at the price or sum of 1850*l.*; but if default should be made in payment of the said rent half-yearly within the respective days aforesaid, this agreement should become,

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DAVIES

v.

THOMAS.

and it was agreed and declared between the parties that the same should be void and of no effect.

This agreement was signed by Mrs. *Twynning* and the Plaintiff, and witnessed by one *Stephen Phillips*.

In 1823 Mrs. *Twynning* married the Defendant *Thomas Thomas*.

The bill prayed that the Plaintiff might be let in to redeem, or that he might be declared entitled, under the clause of repurchase, to have a reconveyance, upon such terms as the Court might deem just.

The Defendant *Elizabeth Thomas*, by her answer, said, that some months after she became the purchaser, the Plaintiff proposed to become the tenant, and that she should agree that he might repurchase according to the memorandum; but this Defendant said that the said lease and the memorandum formed no part of the consideration for the conveyance, and were not part of such transaction; but that the lease and memorandum were a totally distinct, separate, and subsequent transaction, and the same were not even proposed or contemplated at the time, nor till some months after the said absolute sale and conveyance had been completed and executed as aforesaid. And the Defendant said that the rent had not been paid according to the memorandum; that the Plaintiff had given bills for several sums of rent, which had been dishonoured, and were then due.

One witness for the Plaintiff proved that, at the execution of the conveyance, Mrs. *Twynning* said that if the Plaintiff would repay her the purchase-money in five years he might have the lands back again; but a witness examined on behalf of the Defendants swore that

he was present at the execution of the conveyance, and that nothing was then said as to Mrs. *Twynning* giving back the property on any terms whatever. Another witness for the Plaintiff proved a tender to Mrs. *Thomas* in her dwelling-house, on the 25th *January* 1825, of 1965*l.*, being the full principal and interest due on the mortgage.

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THOMAS.

It appeared by the evidence for the Plaintiff that, on the 10th *November* 1824, the Defendant *Thomas Thomas* received the sum of 121*l.* 15*s.* 4*d.*, being the proceeds of a sale made under a distress for arrears of rent due on the 29th of the preceding *September*; and a witness proved that he was present on the 11th *December* 1824, when notice was given on behalf of the complainant to the Defendant *Thomas Thomas* of his intention to avail himself of the memorandum to repurchase.

A witness for the Defendants, an auctioneer, proved the taking of a distress for recovery of arrears of rent, and that the Plaintiff then desired him to surrender his lease, as he had nothing else to do; and Plaintiff then delivered the lease to the witness, who delivered it to Mrs. *Thomas's* agent to be surrendered to her.

The evidence as to value was conflicting.

Mr. *Pemberton* and Mr. *T. Parker* for the Plaintiff.

In the cases of *Mellor v. Lees* (a), *Willett v. Winnill* (b), and *Floyer v. Lavington* (c), the principle of redemption was recognized: it is immaterial, that the shape of the transaction is that of purchase and power to repurchase; it is the same as a mortgage with power to redeem:

(a) 3 *Alt.* 494.

(b) 1 *Vernon*, 488.

(c) 1 *P. Wms.* 268.

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 {
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the purchase money was not the value; and there is sufficient made out to entitle the Plaintiff to redeem. Is he not to be allowed to repurchase because he was a little behind hand, because the rent was not paid at the very day?

The MASTER of the ROLLs.

I think the only material question here is, whether the Plaintiff is entitled to repurchase?

Mr. Bickersteth for the Defendants.

The rent was not regularly paid, in some cases not until distresses were levied. By the express terms of the contract, *time* is made the essence of the contract; the Plaintiff then is not in a situation to call on the Defendants for specific performance; time is the essence of this contract.

Mr. Pemberton in reply.

There can be no distinction between a mortgage with a right to redeem, and a conveyance with a power to repurchase, they both operate as a security: this is a conveyance with a right to repurchase.

The MASTER of the ROLLs. This is not forfeiture: a particular indulgence is given to the Plaintiff, provided certain payments are made at particular times. Is it not like a condition in a mortgage at 5 per cent., that on payment of 4 per cent. at a certain time that shall be a good payment of interest? The debtor is not entitled to a reduction of interest unless payment be made at the time mentioned. It is not proved that these transactions were contemporaneous: the evidence on the part of the Defendants proves the contrary. I am clearly of opinion, upon the evidence, that they were not contemporaneous;

and I should have doubted the conclusion of law if they had been so.

1830.

DAVIES

v.

THOMAS.

I will look into the question of repurchase. The question is, whether it comes within the principle of forfeiture, or within the principle of indulgence?

Cur. adv. vult.

His Honor gave judgment, dismissing the bill with costs.

May 18.

Reg. Lib. 1829. A. p. 1424.

CHAMPION v. RIGBY.

ROLLS.

May 19. 21.

THE Defendant was a solicitor, and had acted as such for the Plaintiff.

Attorney and
Client.Vendor and
Purchaser.

In 1810 the Plaintiff was possessed of a wharf, which, in the division of his father's property in 1799 was valued at 700*l*. The Plaintiff also purchased a leasehold house and warehouse in *Thames Street*, subject to an under-lease for 1370*l*., and then purchased the under-lease for 675*l*. The Defendant was concerned for him as his attorney in these transactions.

A solicitor having purchased a property of his client at an under-value, the client eighteen years afterwards brought his bill to set aside the sale.

The Plaintiff became embarrassed, and the Defendant purchased this property from him for 1400*l*.

The Court was of opinion that a solicitor dealing with

his client was bound to shew that he had given his client the price which he would have advised him to accept from another person; but the Plaintiff having failed to shew that he was not in a situation during the time which had elapsed to seek relief, the Court dismissed the bill, but without costs.

Semble. Had the Plaintiff applied to the Court in a reasonable time, or had the Court been satisfied by evidence of his total inability to take proceedings in this Court, he would have had relief.

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 CHAMPION
 v.
 RIGBY.

Witnesses for the Plaintiff proved that the property was in 1810 worth 2430*l*.

The evidence on the part of the Plaintiff went to shew that the Plaintiff was in embarrassed circumstances from the time of the sale up to 1824; but by the answer, the Defendant stated that the Plaintiff received a considerable accession of fortune on the death of his mother, a few years after the sale, and kept saddle and sporting horses.

The bill was filed in 1828.

Mr. *Bickersteth* and Mr. *Younge* for the Plaintiff.

The Court must interfere to protect clients from the conduct of their solicitors.

It is the duty of a solicitor, who purchases from his client, to shew that he has given an adequate consideration; in this it was clearly inadequate. It is evident that, during the whole transaction, advantage was taken by the Defendant of the Plaintiff, and of the influence which, as the Plaintiff's solicitor, he possessed.

Mr. *Tinney* and Mr. *Pemberton* for the Defendant.

Where a client comes to a solicitor and offers a property for sale, that solicitor does not come within the rule of a purchase by a client from a solicitor, the transaction being independent of the connection between attorney and client, he not being the attorney in *hâc re*. *Montesquieu v. Sandys* (a), *Cane v. Lord Allen* (b), *Gibson v. Jeyes*. (c) The case before the Court is a single transaction of purchase and sale. The remaining question

(a) 18 *Ves.* 513.

(b) 2 *Dow*, 289.

(c) 6 *Ves.* 266.

is, whether at a distance of eighteen years this transaction ought to be set aside? A person applying to this Court ought to shew diligence and despatch: it is not fair to call upon a person to defend his conduct at that distance of time. For eighteen years the Defendant has been allowed to consider this as a part of his income, spending it on his own family. After so long a time, the Plaintiff cannot come into a court of equity, unless it can be shewn that he had ever since laboured under the same disability which first led him into the transaction; but there is no evidence to that effect; there is evidence of his having subsequently possessed abundant means. We prove his receipt of large sums.

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 CHAMPLON
 v.
 RIGBY.

The MASTER of the ROLLS. The receipt of sums is nothing; for a man may have demands upon him to ten times the amount.

Mr. *Pemberton* read a passage from the Defendant's answer, that the Plaintiff had kept saddle and other sporting horses, and was lately the owner of, and about to run a horse, so that Defendant believed the Plaintiff could not have delayed instituting proceedings against the Defendant for want of proper means.

The MASTER of the ROLLS. Then the Defendant has by his answer rendered it necessary that the Plaintiff should shew why he did not proceed sooner.

Mr. *Pemberton*. Due vigilance ought to be evinced by a party who applies for the extraordinary aid of this Court. In *Gregory v. Gregory (a)* a suit, after a lapse of eighteen years, was dismissed. *Purcell v. Macnamara. (b)* Ignorance on the part of the Plaintiff there

(a) *Cooper*, 201.

(b) 14 *Ves.* 90.

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CHAMPION
v.
RIGBY.

was none; he knew the value of the property well; difficulty in pursuing his remedy he had none, for he had sufficient means, and he consulted a solicitor. The premises are now pulled down, so that their former state is quite a matter of conjecture; and those who could give evidence in the Plaintiff's favour have died one after the other. I trust your Honor will be of opinion, that however questionable this transaction might have been originally, still, that, after the lapse of eighteen years, the Plaintiff is not entitled to come here and seek relief.

Mr. Pemberton was about to read evidence.

The MASTER of the ROLLS. I had better call upon the Plaintiff. The only difficulty is the point as to the time which has elapsed.

Mr. Bickersteth then read evidence to explain that the Plaintiff did not proceed sooner from the state of his circumstances; and which stated, that the Plaintiff was in a state of embarrassment down to 1824.

The MASTER of the ROLLS.

The question is, whether what has been proved accounts for doing nothing for eighteen years, and whether a court of equity should interfere after this lapse of eighteen years?

I am of opinion that a court of equity ought not to interfere, unless the Plaintiff can shew that he had not been in a situation to seek relief.

Mere evidence of embarrassment is not sufficient; the Plaintiff in this case had opulent relations.

I am of opinion, that a solicitor dealing with his client is bound to shew that he has given his client the price which he would have advised his client to accept from another person.

1830.
CHAMPION
v.
RIGBY.

I am of opinion, that that was not the case here; but the Plaintiff has not applied in time, nor accounted for the delay.

Bill dismissed, but without costs.

WALSH v. WALLINGER.

ROLLS.
December 2.

J. W. A. WALLINGER, by his will, dated the 19th January 1805, gave unto his wife *Matilda* all his personal estate and effects for her sole use; and he gave and devised unto his brother, *Joseph Wallinger*, *William Baldwin*, and *William Turner*, and their heirs, his estate called *Hare Hall*, and other lands, and all other his real estate, in trust to sell and dispose of the same as soon as conveniently might be after his decease, and after deducting the costs, and the payment of all incumbrances and his just debts, to pay the residue thereof unto his wife, to and for her own use, benefit, and disposal, trusting that she would thereout provide for and maintain his family, and particularly his only son, and at her decease give and bequeath the same to her children by him, in such manner as she should appoint. And the testator appointed his wife and the said three

Will.
Powers.

A testator directed trustees to sell his real and personal estate, and pay the amount of the produce to his wife, trusting that she would provide for his family, and at her decease that she would give and bequeath the same to her children by him, as she should appoint. The widow, by will,

made an appointment to five of her seven daughters:

Held, that the appointment was void, all the children being entitled to the benefit of the fund:

Held, that the widow could only execute the power by will, and that only such of her children took an interest as survived her, and consequently that the representative of a child who died before her could not take any part of the fund.

1830.

WALSH

v.

WALLINGER.

trustees executors of his will. The testator left one son and eight daughters by his said wife. The widow and *W. Turner* proved the will, the other two executors renounced the probate, but all three trustees took upon themselves the execution of the trust. By a deed, dated the 29th *March* 1805, *Matilda Wallinger*, the widow, released unto the trustees all her right and interest in or to the residue of the monies to arise by sale of the real estate devised by the testator in trust to be sold, but nevertheless upon such trusts as the same would have been subject to in the hands of the said *Matilda Wallinger*, widow of the said testator, if he instead of expressing himself as trusting, or intimating that his said trustees should trust, that his said wife would thereout provide for and maintain his family, and particularly his only son; and at her decease, give and bequeath the same to her children by him, in such manner as she should appoint, had in and by his said will imperatively directed her, the said *Matilda Wallinger*, widow, during her life, out of the interest of the said residue, to provide for and maintain his children, and particularly his only son, and at her decease to give and bequeath the whole of the residue to her children by him, in such manner as she should appoint.

The real estates were sold, and in *February* 1815 there was standing in the name of *Joseph Wallinger*, the surviving trustee, the sum of 2508*l.* 3 per cent. Consols; of which, by indenture dated the 4th *February* 1817, in pursuance of the power remaining in her by virtue of the said will and of the indenture of the 29th *March* 1805, she appointed the trustee to sell out so much stock as would produce 1000*l.*, and pay it to her son, *J. A. Wallinger*, for his sole and separate use, and he thereby agreed that he should not be entitled to any further share, unless his mother. by deed or will

made a further appointment in his favour (a); and on the 15th *February* 1817 the son entered into a covenant to pay his mother 5 per cent. on the 1000*l.* during her life.

1830.

 WALKER
 &
 WALLINGER.

Caroline Wallinger, one of the daughters, died in *June* 1828, and *John Arnold Wallinger* took out administration to her effects.

Mrs. *Matilda Wallinger* made her will, bearing date the 13th *May* 1828, as follows: — “This is the last will and testament of me, *Matilda Wallinger*, at *Nice*, and as I mentioned in my will bearing date the 30th *March* 1805: — My daughter *Elizabeth Franciska* being amply provided for by the late Mr. *Fisher* of *Ealing Park*, that she was not to have any share of my property, and I wish it to be understood that it must remain so; likewise *Anna Maria Daniel*, my eldest daughter, is not to have any share in any of my property, being likewise well provided for; likewise my son *John Arnold Wallinger* having had 1000*l.* of me, which was thought an ample share, and as much as could be spared from my daughters, but I now bequeath to him 50*l.* for mourning. I do hereby direct and appoint that the residue of such trust monies as are in the stocks, funds, or securities and annuities, shall be shared alike between my daughters, *Matilda Wallinger*, *Charlotte Wallinger*, *Mary Anne Wallinger*, *Harriett Wallinger*, *Louisa Wallinger*, in equal shares and proportions, and share and share alike.”

Mrs. *Wallinger* died in *May* 1829, and left her son and seven of her daughters, of whom six were married,

(a) There was no attempt to disturb this, the sum appointed being about what the son would have received under the principle of the judgment given.

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surviving her. At the time of her will and death the trust-fund amounted to 7276*l.* 3 per cent. Reduced Annuities, and 935*l.* 3 per cent. Consols, standing in the name of *Joseph Wallinger*, who died in *December 1827*, having appointed *A. M. Wallinger*, his widow, executrix thereof.

This bill was brought by the five daughters, to whom the property was appointed by the will of *Matilda Wallinger*, submitting that her will was a good execution of the power of the will of the husband, and of the indenture of the *29th March 1805*, and that the stock ought to be sold and divided amongst them.

By the answers it was submitted that the will of the testatrix was void as to the trust fund, by reason of her having appointed no part amongst the Defendants *Anna Maria Daniel*, *Elizabeth Franciska Roberts*, or *Caroline Wallinger* deceased, or her representatives; and the son claimed to have a distributive proportion to make up the 1000*l.* received by him out of the trust fund equal in amount to the shares of the other claimants.

Mr. *Pemberton* and Mr. *Longley*, for the Plaintiffs, argued that the words of the will of the testatrix being "In such manner as she shall appoint," shew that she was to have a large discretion, and cited *Burrell v. Burrell* (a), *Civil v. Rich* (b), and Lord *Alvanley's* observations on *Burrell v. Burrell* in *Kemp v. Kemp* (c), and in *Spencer v. Spencer* (d), and referred to the principles sanctioned by stat. 1 *W. 4. c. 46*.

Mr. *Tinney* and Mr. *Temple* for Defendants, the two daughters not provided for by their mother's will, and

(a) *AmbL.* 660. before Lord *Camden*.

(b) 1 *Ch. Ca.* 309.

(c) 5 *Ves.* 849.

(d) 5 *Ves.* 362.

who survived her. *Burrell v. Burrell* was apologised for by Lord *Alvanley*; *Gibson v. Kinven* (a) is a case the Courts have come back to.

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Mr. *Bickersteth* for *John Arnold Wallinger*, the administrator of *Caroline Wallinger*. This is not confined to a trust for children living at the death of Mrs. *Wallinger*. The words of the will, "In such manner," must be considered as pointing to the shares or proportions. The authority of *Burrell v. Burrell* has been doubted. *Vanderzee v. Aclom*. (b)

Mr. *Pemberton* in reply. In *Kemp v. Kemp* the word "amongst" was the ground of the decision. *Gibson v. Kinver* is not reconcilable with *Burrell v. Burrell*. *Gibson v. Kinver* was an early case. Unless *Burrell v. Burrell* is to be overruled, your Honor will not hold the power to be ill executed. The whole doctrine is extremely artificial, and will now, fortunately for the ends of justice, be entirely swept away.

The MASTER of the ROLLS. The decisions are to be followed as precedents. The testator gave the residue to his wife, trusting that, at her decease, she would give and bequeath the same to her children by him. Do the words "in such manner as she shall appoint" mean a right to exclude any? Under such words it has been decided that all the children should take. All children, capable of taking by gift and bequest of the mother take an interest here. *John Arnold Wallinger* has excluded himself, and can take nothing.

Mr. *Pemberton* and Mr. *Longley*.

Dec. 6.

The remaining question is, whether a representative

(a) 1 *Vern.* 66.

(b) 4 *Ves.* 770.

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of a deceased child can take a share in default of appointment? There are two recent decisions, which clearly establish that such representatives cannot take. *Kennedy v. Kingston* (a), *Needham v. Smith* (b); and there are no cases contrary to these decisions. The words “do,” “lego,” — “I give and bequeath,” are usual testamentary phrases; and the testator in this case having empowered his wife to give and bequeath, could only have contemplated a disposition by her by will, and only such children could take under her will as might survive her. *Doe dem. Thorley v. Thorley* (c), and *Justinian’s Institutes*, lib. 2. tit. 20. par. 30, 31.

Mr. Tinney and Mr. Temple for other parties in the same interest.

Mr. Bickersteth for the administrator of *Caroline Wallinger*.

The children took a vested interest, and the widow a power of appointment. The mode of divesting that interest was an actual appointment by the widow. She had it in her power to make a provision in her lifetime, as she in part did for *John Wallinger*. (d) *Boyle v. Bishop of Peterborough* (e), *Butcher v. Butcher* (g), *Malim v. Keightley* (h), *Malim v. Barker* (i), *Grace v. Wilson*. (k) It is immaterial whether done by deed or will, the interest being vested, subject only to be divested by an execution of the power. The question was, whether the lady, upon the marriage of any of her children, could make a settlement? Could she not, as she did,

(a) 2 *Jac. & Walk.* 431.

(b) 4 *Russ.* 318.

(c) 10 *East*, 438.

(d) 1 *Roper on Legacies*, 537.

(e) 1 *Ves. jun.* 299.

(g) 1 *V. & B.* 90.

(h) 2 *Ves. jun.* 535.

(i) 3 *Ves. jun.* 150.

(k) *Rolls MS. October 1811. Sugden on Powers*, 210. 2d edit.

upon the son setting up in business, when she made him an advance of 1000*l*.? The will is a bad appointment, for it excludes two of the children, who were living at the death. There is no case like this in its circumstances, yet upon the general principle of a vested interest, liable to be divested by the execution of a power, and that execution having failed by the execution being imperfect, the interest has not divested.

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Mr. Cooke with Mr. Bickersteth.

Every object of the power took a vested interest, and in the event of any of them dying during the life of the donee of the power, the share of the person dying went to that person's next of kin.

The MASTER of the ROLLS.

The question is, whether this is a general power, or a power limited in the mode of execution to a will? I hold the words "give and bequeath" are only testamentary, and the power given could only be executed by will. The words of the will do not give a vested interest to the children, consequently the representative of *Caroline Wallinger*, who died before her mother, could not take, and those only could take who survived the donee of the power.

Declare, that under the will of *J. W. A. Wallinger*, the wife had virtually an estate for life only in the residue, with a power of appointment by her will only; that the words "give and bequeath" were testamentary; that consequently only children alive at the death of the wife could have taken under her appointment; and only such children could take (they having no vested interest in them in the wife's lifetime under the testator's will,) in default of appointment. Hence, that *Caroline*

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Wallinger, who died in her mother's lifetime, had no vested interest, and Defendant, *John Wallinger*, her representative, can take nothing in her right.

Costs of all parties out of the estate. Costs of Mrs. *A. M. Wallinger* the trustee, as between solicitor and client, including her previous reasonable expenses relating to the trusts.

Decree, that the appointment of the trust-fund made by the will of *Matilda Wallinger* is void, and that the trust-funds are divisible between the only children of *John Wallinger Arnold Wallinger*, Esq., deceased, the testator in the pleadings named, who were living at the time of the death of the said *Matilda Wallinger* (except the Defendant *John Arnold Wallinger*), in equal seventh parts. The decree went on to order, that some of the married ladies who resided abroad should attend certain persons named in the decree, to be examined as to the disposal of their shares.

Reg. Lib. 1829. B. p. 513.

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FOSBROOKE v. BALGUY and Others.

WESTMINSTER
HALL.
Monday,
June 21.

THIS was the petition of the Plaintiff, stating that the Defendant filed his answer in this cause on the 3d *February* 1830, to which exceptions were filed on the 22d *March* following. By an order bearing date the 30th day of *March*, it was referred to the Master in rotation, to look into the bill, and the answer and the exceptions taken thereto by the Plaintiff, and certify whether the answer was sufficient in the points excepted to or not. The Master by his report, dated 22d *April*, certified the Defendant's answer to be insufficient in the whole of the exceptions taken thereto, and allowed the Defendant one month's time to put in his further answer. The report was filed on the 24th of *April*, on which day the petitioner obtained an order to amend his bill, and that the Defendant should answer the amendments at the same time that he answered the exceptions. The amended bill was filed on the 14th *May* 1830. By an order, bearing date 7th *June*, it was ordered, that the Defendant should have a commission to take his answer to the amendments and exceptions, and six weeks' time to return the same. The last-mentioned order was made *ex parte*.

Practice.

The eighth of
Lord *Lynd-*
hurst's orders
applies only
to the answer
to exceptions.

The prayer was, that this order might be discharged for irregularity.

Mr. *Rogers*, for the petitioner.

The order for reference was on the 30th *March*; the Master on the 22d *April* reported the answer insuffi-

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cient, and gave a month's time to answer. The order complained of is irregular.

Mr. Campbell.

The Plaintiff did not file his amended bill until the 14th of *May* 1830, being the last day of the three weeks after the order to amend (*a*), so that according to the Plaintiff's construction, we should only have had from the 14th to the 20th to answer the amended bill. It would be a most oppressive construction of the eighth order (*b*), if it were held that the Defendant must answer the exceptions and amended bill within the month given for answering the exceptions by the Master.

The MASTER of the ROLLS. I am of opinion that the eighth order applies only to the answer to exceptions. I must, therefore, dismiss the petition with costs.

(*a*) Every order for leave to amend the bill must contain an undertaking by the Plaintiff to amend the bill within three weeks from the date of the order.

(*b*) The eighth order is as follows:—

That if upon a reference of exceptions the Master shall find the answer insufficient, he shall fix the time to be allowed for putting in a further answer, and shall specify the same in his report, from the date whereof such time shall run; and it shall not be necessary for the Plaintiff to serve a subpoena for the Defendant to make a better answer. And any Defendant who shall not put in a further answer within the time so allowed, shall be in contempt, and be dealt with accordingly.

See *Brown's Practice of the High Court of Chancery*, vol. i. p. 24.

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BETWEEN

Sir CHARLES COCKERELL, Bart., HENRY TRAIL, Sir CHARLES RICHARD BLOUNT, Bart., The most noble GEORGE Duke of MARLBOROUGH, and JAMES BLACKSTONE, LL.D.
Plaintiffs;

ROLLS.
March 16.

AND

FRANCIS CHOLMELEY, Esq., - Defendant.

SIR HENRY ENGLEFIELD by his will, on the 27th day of November 1778, gave the manor of *Early*, and his manor and mansion-house called *White Knights*, and all and every his messuages, lands, tenements, wood-grounds, rents, tithes, and hereditaments, situate in the parish of *Sonning St. Giles's*, in *Reading*, and *Englefield*, or elsewhere in the county of *Bucks*, unto Lord *Cadogan* and Sir *Charles Bucke*, and to their heirs, to the use of his son *Henry Charles Englefield* for

Power of Sale.
Timber.
Effect of
Agreement
in equity to
execute a
Power of
Sale.
Mistake.
Acquiescence.
Confirmation.

Sir *H. E.* by
his will, de-

vised his lands to trustees, to the use of his eldest son for life, sans waste, and in strict settlement, with remainders over, under which the Defendant ultimately became tenant in tail in possession; and the testator gave his trustees a power of sale, with the consent of the tenant for life. The lands were sold for a price fixed, exclusive of the timber, which was to be valued, and the amount of the valuation paid to the tenant for life. By the conveyances the surviving trustee, in consideration of the price fixed, conveyed the land to the purchaser; and the tenant for life in consideration of the value of the timber, which had then been determined, conveyed the timber to the purchaser:

Held, that this was a bad execution of the power in a court of equity.

The Plaintiff having endeavoured to shew that there was in the letters which passed prior to the conveyance, an agreement for the sale of the estate and timber, without any stipulation that the price of the latter should be paid to the tenant for life, pressed the Court to aid the execution of the power, but the Court being of opinion that there was not such an agreement, and that it was understood by the parties that the tenant for life was to receive the value of the timber, and that the drawer of the instrument had not mistaken the intentions of the parties refused to aid the execution of the power:

Held, that acquiescence in a transaction cannot be maintained unless it be shewn that the party whose interests are affected knew not only the facts which affected his interest, but the legal effect of those facts upon that interest.

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life, sans waste and in strict settlement; remainder to his second son *Francis Michael Englefield*, in strict settlement; remainder to testator's daughter *Teresa Anne Englefield*, in strict settlement; with divers remainders over. And the said testator by his will declared that it should be lawful for the trustees, or the survivor of them, or the heirs of such survivor, from time to time and at all times during the lives of *H. C. Englefield*, *F. M. Englefield*, and *T. A. Englefield*, or during the life or lives of any or either of them, at the request and by the direction or appointment of the person who for the time being should be in possession of or entitled to the rents and profits of the said manor and tenements by virtue of the limitations therein contained, signified by any deed or writing, deeds or writings, under hand and seal, attested by two witnesses, to make sale and dispose of all or any part or parts of the manor and tenements aforesaid to any person or persons whomsoever, either together or in parcels, for such price or prices in money, or in any other equivalent, as to the trustees should seem just and reasonable; and to that end for the trustees by deed or writing under their hands and seals, sealed and delivered in the presence of two or more witnesses, to revoke, determine, or make void all and every or any of the use and uses, trusts, estates, powers, provisoes, and limitations thereinbefore limited, and appoint the manor and tenements aforesaid, whereof the uses should be revoked either unto such purchaser or purchasers, his, her, or their heirs, or otherwise to limit such new or other use or uses as should be requisite; and upon payment and receipt of the money arising from the sale, to give and sign proper receipts, which should be sufficient discharges. The purchase-money to be laid out by the trustees, with the like consent, in the purchase of other lands, to be settled to the like uses; and in the

meantime to be placed out on real or government security.

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In 1782 *Teresa Anne Englefield* married, and the Defendant *Francis Cholmeley* is her eldest son, and the first tenant in tail.

The bill stated the preceding facts, and that *William Byam Martin*, Esq. having caused an application to be made to *Joseph Pearson*, the solicitor of Sir *Henry Charles Englefield*, for the purchase of the manor, mansion-house, and premises, he wrote to Sir *Henry* upon the subject, and Sir *Henry* by letter answered Mr. *Pearson*, that the price was 12,000 guineas, exclusive of the timber, which at a fair valuation, he fancied, would come to 2000 more. Ultimately, after a great number of letters had passed, Mr. *Martin* acceded to the proposition; but the furniture was to be included in the 12,000 guineas. Mr. *Martin* was to have the manorial rights, but not the ground or soil of the commons and lands not purchased. And Mr. *Martin* also agreed to buy the *Foreholds, other parts of the premises* devised by the will, for 800*l.*; so that the purchase-money amounted to 13,400*l.*; and the timber was valued at 24*46l.* 7*s.* 6*d.*

Sir *H. C. Englefield* communicated this to Lord *Cadogan*, the surviving trustee, and requested him to revoke the uses and convey the property to Mr. *Martin*, for the considerations aforesaid; and Lord *Cadogan* approved of, consented to, and adopted the agreement (a), and undertook and agreed to execute the necessary deeds

(a) The Defendant by his answer, alleged that Lord *Cadogan* did not interfere with the sale of the timber, or judge of the reasonableness of its price.

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for carrying the same into execution, but it was agreed that the value of the timber should be paid to Sir *H. C. Englefield* for his own use. An indenture, bearing date the 12th of *May* 1783, was then made and executed, which recited that Lord *Cadogan* by virtue of the power in the will, at the request and by the direction of Sir *H. C. Englefield* testified by that writing under his hand and seal, had contracted and agreed with Mr. *Martin* for the sale to him of the manor of *White Knights*, with the rights, royalties, manors, and appurtenances thereto belonging, except as thereafter is excepted, and also the capital mansion and mansion-house called *White Knights*, with the outhouses, edifices, yards, gardens, orchards, and other appurtenances thereto belonging; and the fixtures, household goods, furniture, garden tools, implements, and utensils in and about the same, and of the messuage, park, lands, tithes, and hereditaments in the parishes of *Soning* and *St. Giles's* in the county of *Berks*, at the price of 13,400*l.*; and that the said Sir *H. C. Englefield*, who, as tenant for life, without impeachment of waste, was entitled to the timber and trees standing and growing and being on the said premises so agreed to be sold to the said *W. B. Martin*, had agreed to sell the said timber and timber trees unto the said *W. B. Martin* for 2148*l.* By this deed Lord *Cadogan* in consideration of 13,400*l.* with the required consent, revoked the uses created by the will, and limited and appointed the premises unto *W. B. Martin* and *Martin York*, and their heirs, to the use of them and the heirs and assigns of *Martin York*. But nevertheless as to the estate of *Martin York*, his heirs, and assigns, in trust for *W. B. Martin*, his heirs, and assigns. By a further witnessing part Lord *Cadogan* and Sir *H. C. Englefield* and Dame *Katherine Englefield* granted unto *W. B. Martin* and

Martin York the manor of *White Knights*, &c. (save the ground and soil of the commons, waste lands, and other commonable places within the manor, and the right of depasturing cattle on the same, in respect of the other hereditaments devised by the will, and all timber on the said commons, and also any allotment which upon an enclosure of the commons might be made of the manor of *White Knights*.) To hold as in the appointment.

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By a further witnessing part, Sir *H. C. Englefield* in consideration of 2448*l.*, conveyed the timber and fruit trees, to hold in like manner: and by another witnessing part, in consideration of the 13,400*l.* paid to Lord *Cadogan*, Sir *H. C. Englefield* assigned the fixtures, household goods, furniture, implements, utensils, and other moveables in and about the premises unto *W. B. Martin*, his executors and assigns.

Some doubts having arisen about the transaction as to the timber, the sum of 2448*l.*, and the dividends thereon, amounting altogether to the sum of 3681*l.* 4*s.* 3*d.* were by Sir *H. C. Englefield* transferred to Lord *Cadogan* upon the trusts of the will.

The estates so purchased by Mr. *Martin* became vested in the Duke of *Marlborough*, (then Marquis of *Blandford*,) *Thomas Coutts*, and *James Blackstone*, in trust for *W. B. Martin*, and they by indentures bearing date the 13th and 14th of *February* 1814, mortgaged the property in fee to *Archibald Paxton*, Sir *William Paxton*, Sir *Charles Cockerell*, and *Henry Trail*, to secure 45,000*l.* advanced and lent to the Duke of *Marlborough*, with interest.

By a deed dated the 10th of *November* 1814, the Duke of *Marlborough* further mortgaged the property

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to Sir *Charles Cockerell* to secure 20,000*l.* Navy five per cents. and the dividends.

Lord *Cadogan* having died, leaving his eldest son a lunatic, an act of parliament was passed appointing new trustees, and in that act the sale to Mr. *Martin* was recited, and the monies and securities in which the purchase-money was invested were directed to be transferred to the new trustees.

The sum of 4282*l.* 14*s.* 9*d.*, part thereof (and which included the purchase-money of the timber), was, in *November* 1819, sold out with the privity of the Defendant, and with his consent applied in defraying the costs of the act of parliament, the expenses of enclosure and exchange of other lands devised by the will; and other charges relating to the trust estates. Some part of the purchase-money had been previously applied to the purchase of land-tax of other estates of Sir *H. Englefield*.

Under a decree in a suit in Chancery, wherein Mr. *Paxton* and his co-mortgagees were Plaintiffs, and the trustees of Mr. *Martin* were Defendants, the property purchased by Mr. *Martin* was sold to the Plaintiff, Sir *Charles Richard Blount*, for 37,000*l.*

By the death of Sir *H. C. Englefield*, the first tenant for life, without issue in 1822, (the second son of the settlor having previously died without issue, and *Teresa Anne*, the daughter of the settlor, having died on the 9*d* of *October* 1810,) the Defendant, the son of *Teresa Anne*, who was of age in *June* 1804, became tenant in tail in possession; and in *July* 1822, presented a petition to the Master of the Rolls, setting forth the sale to Mr. *Martin*, and the said application of the sum of

4282*l.* 14*s.* 9*d.*, and praying that the trustees might be directed to assign the sum of 12,500*l.*, and another small sum, both the purchase monies of Mr. *Martin* to the petitioner, and after a reference to the Master, an order was made accordingly.

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The bill then stated, that in *Michaelmas* term 1823, the Defendant brought his writ of *formedon*, and the question therein was, whether, according to the legal construction of the will of Sir *Henry Englefield*, and of the indenture of the 12th *May* 1783, the power was well executed; whereon the Court of Common Pleas decided, that Lord *Cadogan* having by that deed intended to convey the property without the timber, the deed was void, and judgment was given for the demandant.

The bill charged confirmation, and prayed that the defect in the execution of this power might be supplied.

The Defendant by his answer alleged, that in consenting to the act of parliament and in petitioning the Rolls, he was entirely ignorant of the indenture of the 12th *May* 1783, or the nature or effect thereof, and of the manner in which the power of sale was exercised, and the estate and timber conveyed.

Mr. *Pemberton* and Mr. *Cockerell* for the Plaintiffs.

Mr. *Bickersleth* and Mr. *Lynch* for the Defendant.

The Court put the Plaintiffs to their election to abandon the writ of error pending in the House of Lords from a judgment in the court of law. And Mr. *Pemberton* having elected so to do, the Court allowed the cause to proceed.

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The MASTER of the ROLLS. This is a most unfortunate case; the Plaintiffs and the persons under whom they claim have acted with perfect fairness and integrity.

The question in this cause is, Whether the power of sale is or is not well executed in the consideration of a court of equity, it having been already determined by a court of law that this power has not been well executed.

Powers generally require certain formalities in the mode of execution; and if there be a valuable consideration, this Court will aid the defective execution of a power.

The first enquiry is, whether a trustee for the sale of an estate can convey it with the exception of the timber? The court of law has determined that no such conveyance can be made, and that this therefore is no execution of the power; and if it were competent to this Court to give any opinion upon the subject, I must concur in the judgment which has been given at law.

The court of law has determined what is perfectly plain, that Sir *Henry Charles Englefield* could have no right to the sum of 2448*l.*, the price of the timber; and that the conveyance by the trustee, Lord *Cadogan*, was therefore a conveyance which had no operation, as not being a conveyance under the power. In the opening of this case two grounds were taken upon which the Plaintiff considered that he might be entitled to relief in a court of equity.

The first ground was, that prior to the conveyance so executed by Lord *Cadogan* and Sir *Henry Englefield*,

there had been an agreement in writing which purported to be an agreement made on the part of Sir *Byum Martin*, not for the purchase of the land without the timber of Lord *Cadogan* and the timber of Sir *Henry C. Englefield*, but a contract made with Sir *Henry C. Englefield* for the purchase of the whole estate, including the timber; and it was contended that there being such an agreement in writing prior to the execution of the deed, that a ground might be found for correcting the deed, which did not give effect to the contract as stated. Unfortunately it appears to me that there was no such contract in writing, and that the argument therefore that was built upon the foundation of such a contract must, in my view of the case, totally fail. The next ground adopted in the argument was, that there was plainly here a mistake in the deed; that the deed was drawn contrary to that which was the real substance of the transaction. I perfectly agree that there is a great mistake in the deed; that is to say, that the parties to the deed have misapprehended the effect of the law which applied to this transaction; but a court of equity has no jurisdiction to correct a mistake in an instrument where the parties have proceeded upon error in point of law. The only jurisdiction a court of equity has for correcting mistakes in deeds is where the drawer of the deed, the mere agent and instrument who has prepared the deed, has mistaken the intention of the parties to the deed. Now there is no ground to say that the parties to this deed had not that intention which is expressed upon this deed. This deed recites a contract made with Lord *Cadogan* for the purchase of the land with the exception of the timber. It recites a contract made with Sir *Henry C. Englefield* for the value of the timber. It states the payment of the different

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considerations, and contains upon the face of it an express acknowledgment by Lord *Cadogan*, and Sir *Henry C. Englefield* respectively, that they did respectively receive the several considerations stated in the deed. I cannot consider, therefore, that this, founded certainly on mistake, was founded on the mere mistake of the drawer of the deed. It was certainly the intention of the parties that this deed should be so framed, not from any mistake of the drawer, but because the parties misunderstood the nature of their rights. Sir *B. Martin* paid to Sir *H. C. Englefield* the amount of the value of the timber. He must have intended, therefore, to have received from Sir *H. C. Englefield* the conveyance of that timber for which he paid. This, in truth, substantially disposes of the case.

It is said there are other grounds—the acquiescence on the part of Mr. *Cholmeley*, who came of age in 1804, and who, by notice from his agent, was informed of this transaction, and was informed that Sir *H. C. Englefield* had purchased as much stock as the 2448*l.*, the value of the timber, would have produced at the time of the transaction. I take it for granted this was the case, but did Mr. *Cholmeley* know that the effect of that transaction was, that there had been no valid execution of the power, and that the estate remained subject to the trusts of old Sir *H. Englefield's* will? If he did not know this, the notice to him was wholly out of the question. No man can confirm a transaction prejudicial to his interest, unless he is apprised, not only of the fact but of the law. There is no pretence here to say, that Mr. *Cholmeley*, when he received the notice with respect to the facts, had the least information given to him, or the least knowledge that the effect of the transaction was to leave in him the benefit of

the remainder limited to him by Sir *H. Englefield's* will.

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How can it be charged upon Mr. *Cholmeley* that he has been guilty of any acquiescence in point of time? His right accrued in 1822, and in 1823 a writ of *formedon* was issued, upon which he obtained the opinion of the court of law in his favour. In the year 1819, my Lord *Cadogan* being dead, and the heir-at-law, to whom the trusts under the will of Sir *Henry Englefield* descended, being a lunatic, it was thought proper, inasmuch as there were very large estates depending upon those trusts, to apply to parliament in order to have new trustees appointed in the place of the lunatic heir. Mr. *Cholmeley*, in respect of his remainder in this estate, was called upon to join in the petition to parliament for that purpose, and he accordingly joined, and he consented to the act of parliament. Now, is it possible that Mr. *Cholmeley's* consent, in this manner, could affect his interest, unless he was at the time apprised of the error in law which had been committed, and which left that interest in him? I am of opinion, that, being at the time wholly ignorant of rights which were in him, his acquiescence operated nothing with respect to this defect. Now these are all the grounds upon which this case has been argued, and I am bound, therefore, to dismiss this bill; but considering the circumstances of the case, it would indeed be a great hardship to dismiss it with costs. The circumstances are perhaps the most hard that have ever been known to occur in any court of justice; and I am glad to hear from the counsel on the part of the Defendant, that with respect to the return of the money paid, the Defendant is disposed, without further litigation, to return the 12,500*l.*, and to pay

1850.
 COCKERELL
 v.
 CHOLMELEY.

a proportion of the expense attending the appointment of new trustees, rateably according to the relative value of the property in question at the time at which it was sold. (a)

Decree, that the Plaintiff's bill be dismissed without costs.

Reg. Lib. 1829. A. p. 1534.

(a) Some further explanation took place as to this, and it appeared to be undertaken by the counsel for Mr. *Cholmeley*, that he should reinstate the purchaser, as far as he could, in the situation he would have been had not the purchase been made; this, however, formed no part of the decree, and it was difficult to collect what was really intended, nor is it material to the principle of the decision.

February 15.

HOBSON v. NEALE.

*Vendor and
 Purchaser.
 Title Deeds.*

A purchaser entitled to title deeds having paid his purchase-money into Court, the Court, will not order the money to be divided, and the deeds to remain in the hands of the Master until the completion of the sale of another lot.

THIS cause was set down by the Plaintiff on further directions, for the purpose of obtaining an order of the Court, that the purchase-money, which had been paid into court by the purchaser of the largest lot might be distributed amongst the parties entitled to the fund in the cause. The real estate had been advertised for sale in fourteen lots; the purchaser of the largest lot was to have possession of the title-deeds, and to covenant to produce them. The fourteenth lot remained unsold.

Mr. *Wilbraham*, for the Plaintiff, contended, that the deeds ought to remain in the master's office until all the lots were sold, and that in the mean time this order might be made.

BEFORE THE MASTER OF THE ROLLS.

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Mr. Barber, for the purchaser of the largest lot, argued, that it was not competent to the Court to make any such order, for that without the title-deeds the purchaser would not have the full benefit of his bargain; and without them he could neither settle or mortgage satisfactorily. On the delivery of the title-deeds to him he was quite ready to enter into covenants for their production, and to give an undertaking to enter into such covenant with the purchaser of lot 14., whenever it should be sold.

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HOBSON
v.
NEALE.

The MASTER of the ROLLS would not make any order, and gave the purchaser his costs.

ELIZABETH WATKINS and VIRGINIA WATKINS, Spinsters, - - - Plaintiffs;

ROLLS.

Wednesday,
February 23.

AND

JOSEPH LEWIS, WILLIAM JONES, JOHN PRICE MARTIN, WILLIAM LUCAS and SARAH JANETTA his Wife, RICHARD CONSTABLE, JOHN CONSTABLE, RICHARD OWEN STONE, WILLIAM OWEN STONE, and SARAH OLIPHANT, - Defendants.

BY indentures of lease and release, dated the 28th and 29th January 1755, between Elizabeth Hughes and Letitia Hughes of the one part, and William Wat-

Settlement, ex
provisions,
viri.

Land pur-

chased by the husband, subject to a mortgage, with the money of a half sister of the wife, was on her marriage settled on the husband and wife for their lives, and the life of the survivor of them, remainder to the heirs of the body of the wife, remainder to the right heirs of the husband. The husband having died, the widow and eldest son sold and conveyed part of the lands, and the son alone levied a fine. Many years afterwards, the son being dead, the widow also levied a fine: Held, that the property was not within the spirit of the statute of 11 H. 7. c. 20.; and that the Plaintiffs, who were the issue of the second son, were barred by the fine, with proclamations of the widow.

1830:

WATKINS
v.
LEWIS.

kins of the other part, reciting that *William Watkins* had contracted and agreed for the purchase of hereditaments called *Gelly Vaur Gelly Vach*, the *Paint* and the *Pack House*, in the county of *Monmouth*, for 2480*l.* 10*s.*, and that he was thereout to pay a mortgage debt of 1500*l.* thereon, and to pay 980*l.* 10*s.* to the said *Elizabeth Hughes* and *Letitia Hughes*, who, in consideration thereof, bargained, sold, released, and conveyed unto the said *William Watkins*, his heirs and assigns, the same hereditaments and premises. A receipt is indorsed for the 980*l.* 10*s.*

By other indentures of lease and release, dated the 24th and 25th *April* 1755, between the said *William Watkins* and *Philadelphia* his wife of the first part, *Ann Constable*, spinster, and sister-in-law of the said *Philadelphia*, of the second part, and *Thomas Symons* of the third part, reciting that the purchase was made by *William Watkins*, with the approbation of *Ann Constable*, who had advanced to him the sum of 980*l.* 10*s.* for the purchase thereof, upon condition that the said estates should be settled to the uses thereafter mentioned; he, *William Watkins*, granted, released, and confirmed unto *Thomas Symons* and his heirs all the said estates and premises, to the intent and purpose that *Ann Constable* should, subject to the mortgage, receive a rent-charge of 30*l.* per annum for her natural life out of the premises; and as to the fee and inheritance thereof, subject to the mortgage and annuity, to the use of *William Watkins* and *Philadelphia* his wife, for their natural lives and the life of the survivor, with remainder, to the use of the heirs of the body of *Philadelphia* by *William Watkins*, with remainder to the use of the right heirs of *William Watkins* for ever.

By indentures of the 23d and 24th *June* 1758, to which *William Watkins* and *Philadelphia* his wife were

parties, after reciting that there was due for principal and interest upon the mortgage the sum of 1600*l.*, and that *Ann Constable* had paid the same to the persons entitled thereto, all the said mortgaged premises were by the mortgagees conveyed to *Ann Constable* and her heirs, subject to a proviso for the redemption thereof by the said *William Watkins* and *Philadelphia* his wife, or either of them, or by the heirs of either of them, upon payment of 1600*l.* and interest; and it was declared that upon payment thereof *Ann Constable* should reconvey to the uses of the indentures of the 24th and 25th days of *April* 1755. *William Watkins* and *Philadelphia* his wife thereby covenanted for the payment of the mortgage-money and interest.

1830.
 WATKINS
 v.
 LEWIS.

By other indentures, dated respectively the 6th and 7th *May* 1760, *William Watkins*, in consideration of a release of the interest then due upon the said mortgage, and for other considerations therein mentioned, released and conveyed unto *Ann Constable* and her heirs all his estate and interest in the premises, but subject to the estate and interest therein of *Philadelphia Watkins*.

William Watkins, the husband of *Philadelphia Watkins*, died in her lifetime, and *Edward Watkins*, their eldest son, died in the year 1816, in the lifetime of *Philadelphia Watkins*, without issue, and *John Watkins*, the father of the Plaintiffs, was the second son of *Philadelphia Watkins* by *William Watkins*, and he also died in the lifetime of *Philadelphia Watkins*, leaving the Plaintiffs his only children and co-heiresses at law.

Philadelphia Watkins died on the 2d of *February* 1823, leaving the Plaintiffs the heirs of her body by *William Watkins*.

1830.

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v.
LEWIS.

Edward Watkins levied a fine of this property in *Easter* term 18 G. 3., whilst his mother was yet living, and by indentures of lease and release of the 14th and 15th days of *December* 1780, *Philadelphia Watkins* and *Edward Watkins*, and the devisees and executors of *Ann Constable*, conveyed the *Gelly Vaur*, part of the property in the settlement, to *James Jenkins* and his heirs.

In *Hilary* term 1822, *Philadelphia Watkins* levied a fine of the *Gelly Vaur*, and the uses thereof were declared to *Jenkins* in fee.

By indentures of lease and release of the 22d and 23d days of *June* 1813, the same persons conveyed the *Pant*, other part of the property in the settlement, to *John Price* in fee. *John Price* by another deed demised the same to *Edward Watkins* for 500 years, to secure the payment of 2500*l.*, part of the purchase-money and interest.

By indenture dated the 20th of *September* 1822 between *Philadelphia Watkins* of the one part, and *John Price* of the other part, reciting, amongst other things, that it had been then lately ascertained, that at the time of the execution of the indentures of the 22d and 23d of *June* 1813, *Philadelphia Watkins* was seised of or entitled to, amongst other hereditaments, the messuage or tenement and farm called the *Pant*, and the yearly sum of 4*l.* 5*s.* 2*d.* for an estate or interest in tail under or by virtue of the uses or limitations contained in the indenture of release of the 25th *April* 1755, and that inasmuch as the fine so levied in the 18 G. 3. was levied by *Edward Watkins*, in whom the remainder or reversion of such estate tail was vested (a), and not by

(a) *Philadelphia* alone was seised in tail. During her lifetime the issue were not seised at all, and *Edward* having died in her lifetime, he never had any interest at law or in equity.

Philadelphia Watkins, it had been deemed expedient, for the purpose of barring or extinguishing the estate or interest in tail of *Philadelphia Watkins* of and in the said hereditaments, and of establishing and confirming the title of *John Price* and his mortgagee thereunto, that a fine should be levied by *Philadelphia Watkins*, and she thereby covenanted to levy a fine *sur consauance de droit come ceo, &c.*, with proclamations, of the premises comprised in the indentures of the 22d and 23d June 1813. And it was declared that the same should enure to the use and intent, in the first place, to establish and confirm the term of 500 years granted or demised to *Edward Watkins*, his executors, administrators, and assigns; and subject thereto, to *John Price* in fee.

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 WATKINS
 v.
 LEWIS.

The last-mentioned fine was levied by *Philadelphia Watkins* in *Trinity* term, 3 G. 4.

Mr. Bickersteth, *Mr. Preston*, and *Mr. Jacob* for the Plaintiffs.

The first question is, Whether this was a provision made by *William Watkins* for his wife and family?

Secondly, Whether *Philadelphia Watkins* has properly alienated this property?

And, thirdly, Whether the purchaser had notice?

As to the first question, Whether this was a purchase by the husband so as to make it an estate tail within the statute, or whether *Ann Constable* was the purchaser of the equity of redemption? It is clear that the property was contracted to be purchased by *Watkins*, and it is a purchase by the husband, so as to make it a pro-

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 WATKINS
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 LEWIS.

vision moving from the husband. *Watkins* was bound to pay the purchase-money. Suppose the wife had died the day after the contract, must not *Watkins* have paid the purchase-money? his personal representatives could not have refused to pay it. It is not sufficient to shew that Mrs. *Constable* paid the purchase-money in consideration of the settlement; but it must be shewn that she purchased the equity of redemption in fee.

Now, suppose Mrs. *Constable* had become bankrupt, could her creditors under the then bankrupt laws have recovered the estate, or the money which had been paid for it? they certainly could not.

This is not the purchase of an equity of redemption, but the purchase of the estate.

Most of the cases on this subject are collected in *Viner's Abridgment*, under the head *Jointure and Jointress*, vol. xiv. 549.; and the case of *Simson v. Turner*, 1 *Eq. Ca. Ab.* 220, decided by the Lord Keeper in *Trinity* term, 1700. (also in *Viner*, 555.) In *Cruise on Common Recoveries* they are collected, *Stockbridge's* case, *Cro. Eliz.* 24. If husband and wife are joint-tenants, and settle—as to one moiety, it is the settlement of the wife, and as to the other moiety, of the husband.

There is a case also in *Dyer* (a), where the husband and wife were, under their marriage settlement, joint-tenants in tail; there the father of the wife covenanted in the settlement to pay 70*l.*, the wife survived and levied a fine which was adjudged to be against the statute; the report states, that the settlement was as well in con-

(a) *Villiers et Beamonte, Lincoln, Dyer*, 146 a., *Easter* term, 4 & 5 P. & M., and 14 *Fin.* 551. The grandfather and grandmother of the husband settled the lands in this case.

sideration of the marriage as the money. Now this case shews, that although part of the money be paid by a friend of the wife, that payment does not take the case out of the statute. (a)

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WATKINS
v.
LEWIS.

If an estate be purchased where the consideration moves partly from the husband or his family, and partly from the wife or her family, the whole is subject to this statute; otherwise a difficulty would arise in severing the parts to be within the statute, from those not within it, according to the consideration paid by the parties. In *Stockbridge's* case (b), the husband and wife were previously entitled to the copyhold; the husband purchased the freehold, yet the Court considered it merged and bound by the statute, *Symson v. Turner*. (c)

As to the second question, the conveyance to *Jenkins* contained a declaration that all fines, and particularly the fine of 18 G. 3., should enure to the purchaser. It was founded on the fine of *Edward Watkins* alone, without the widow — the widow being then tenant in tail in possession. *Edward* died in 1816, and his death terminated his interest in the property, and of all persons who could claim under him. *John* had died before. Upon the death of *Edward* without issue, the Plaintiffs were heirs in tail in remainder expectant on the death of *Philadelphia* the mother.

In 1822 *Mrs. Watkins* levied a distinct fine of the *Pant* estate, and executed a deed to confirm the title to the premises formerly conveyed to *Mr. Price*. Now,

(a) *Piggott v. Palmer*, *Moore*, 250. But see the cases of *Eyston v. Studd*, *Plowden's Commentaries*, 463.; *Copland v. Piatt*, *Sir William Jones's Rep.* 254.; and *Cro. Car.* 244.; 14 *Fin.* 551. pl. 6.

(b) *Ante*, 453.

(c) 1 *Eq. Ca. Ab.* 220.

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the fine levied by *Edward* alone could not operate upon the estate of his mother; and if the mother had her estate tail *ex provisione viri*, she could not alien without the concurrence of the next heir of the inheritance.

By the act of the 11 H. 7. c. 20., the fine levied by the son must be part of the same transaction with the fine levied by the mother, and the two fines cannot be combined. By this statute it is provided, that it shall not extend to a recovery where the heirs next inheritable to the woman, or he that after her death shall have the inheritance, be assenting or agreeable to the recoveries, where the same assent or agreement is of record or enrolled.

The party must join in the very fine, or the deed whereby the assent is given must have been enrolled as part of the same transaction.

The two fines together cannot effect the object. In *Seymour's* case (*a*), the tenant in tail made a bargain and sale, and afterwards levied a fine. This was held not to be a discontinuance, because the bargain and sale and fine were not parts of the same transaction. In *Herring v. Brown* (*b*) it was admitted, that if a man, having a power, levy a fine, and afterwards by deed execute the power, the fine destroyed the power. The fine of the son cannot after his death be used as a consent to the fine of the mother. She was for the purpose of her sole alienation, no more than a mere tenant for life.

Inasmuch as *Edward* was dead without issue when *Philadelphia* levied her fine, that fine is within the

(a) 10 Co. Rep. 96.

(b) 1 Vent. 368—371.

statute of *Hen. 7.*; and the fine of *Edward*, he having died in the life time of *Philadelphia*, was worth nothing; but had he survived, then, by force of the statute 11 *Hen. 7.*, if proclamations were made, his fine would have been an effectual bar. When tenant in tail hath two sons, and the eldest son levies a fine with proclamations; and the father dies leaving that son or any descendant of that son inheritable to the tail, the fine will bar; but if the first son dies without issue in the lifetime of his father, the second son or his issue are not barred. *Edward Watkins*, when he levied the fine, had no interest in the property, but had he survived his mother, the fine would have bound him and his issue by estoppel.

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As to the third question. The purchaser had notice of the settlement(a) through the deed of 1780 which set out that settlement. The legal estate is outstanding, therefore, the only remedy the Plaintiffs have is in this Court.

Mr. Tinney and Mr. Wrottesley for *John Price*. This is a bill filed for redemption of the mortgage; and we maintain that this was a settlement of the equity of redemption which was paid for, not by the husband, but by *Ann Constable*, the half sister of the wife, and not a settlement proceeding from the husband *ex provisione viri*. The whole purchase was a purchase of the equity of redemption for 980*l.* 10*s.* Then follows the settlement upon which all this question arises; and it is stated therein that she had advanced the whole consideration for the purchase thereof, upon condition that it should be settled as thereafter mentioned.

(a) Mr. Tinney admitted this.

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Now the statute of 11 *Hen.* 7. only applies when the property moves from the husband. We admit it is not necessary that the whole should move from him. (a) To bring the case within the statute, it must be shewn that the estate moved from the husband. The value of the estate, it being an equity of redemption, was 980*l.* 10*s.*; that was the whole consideration, and that was paid by *Mrs. Constable*. In the cited case of *Simson v. Turner* (b) the lands were given by the husband's ancestors.

It is said that part of the consideration came from *Watkins*, because he became liable for the mortgage-money; but if a tenant for life pays off a mortgage, he keeps it subsisting, and is entitled to it: the property is expressly conveyed subject to the mortgage for 1500*l.* In 1758 *Mrs. Constable* paid off the mortgage-money. *Watkins* had not kept down the interest; and *Mrs. Constable* paid off principal and interest, and took a covenant from *Watkins*, that he and *Philadelphia* his wife, or their heirs, would pay it off; but this cannot affect the transaction of 1755. After this she took a conveyance of his life-interest, and released him from all responsibility in respect of the mortgage. All these circumstances shew what the transaction was. Now it is said that this statute would protect not only the issue, but the other persons taking under the settlement; but *Mr. Watkins* has conveyed all his interest to *Ann Constable*; and her devisees, with *Philadelphia* and *Edward*, joined in the sale; and if this case be within the statute, has not the statute been satisfied? *Edward* at that moment was the person "next heritable to the said woman." In the convey-

(a) *Ward v. Walthew*, *Cro. Jac.* 173.; *Copeland v. Piott*, *ante*, 454.; *Kynaston v. Lloyd*, *Cro. Jac.* 624.; *Eyston v. Studde*, *ante*, 454.

(b) *Ante*, 454.

ance *Philadelphia Watkins* entered into a covenant for further assurances. The next heir assented to a conveyance by her of those lands, and he was the person whom the statute meant to protect. The purchaser called upon *Philadelphia Watkins*, on her covenant for further assurances, to levy a fine, and she did so. It is not required that the next person entitled should join, but should assent. His assent is here of record; and that takes the case out of the statute. Where can be the difference whether *Philadelphia Watkins* levied the fine at the time of the assent or afterwards? *Villiers v. Beaumont*.(a) But if *Philadelphia* be an ordinary tenant in tail, her fine is a sufficient title.

1830.

 WATKINS
 v.
 LEWIS.

Mr. *Treslove* and Mr. *Duckworth*, for *Lucas* and wife and *Oliphant*, mortgagees of *Price*. What was the object of the party who made the settlement? The object of *Ann Constable* was to provide for the issue of her sister. *Copeland v. Pigott*.(b) The question is, whether the settlement comes from the husband: if it does, then it is within the statute.

Do the cases which have been cited compel the Court to come to the conclusion which the Plaintiffs seek to attain? Certainly not: all the cases cited are either of marriage alone, marriage with money, or the lands moved from the husband or his ancestors.(c)

In a case in which husband and wife were joint-tenants, and the wife levied a fine, his part was held to be within the statute, but the other was not so. In the case of *Copland and Piott* the 140*l.* was a marriage

(a) *Ante*, 453.

(b) *Ante*, 454.

(c) *Llinaston v. Lloyd, Palmer*, 213.

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 v.
 LEWIS.

portion. In the Bishop of *Exeter's* case, where the consideration was the property of the husband, and he conveyed to husband and wife in tail, yet that was held to be not within the statute. It is true, it there appeared that the wife was a cousin of the bishop. Now, although the conveyance was to *Watkins*, yet, if it appeared that the purchase was originally made for the wife's friends, that trust would have its effect. The settlement overrides the whole transaction from the very beginning.

Mr. *Pemberton* and Mr. *Turner* for a trustee.

Mr. *Bickersteth* in reply.

If this case is not within the statute, I admit that the fine of *Philadelphia Watkins* in 1822, established the Defendant's title. The fine levied by *Edward* ceased to have effect on his death. It is said, that the fine levied in 1778 by *Edward* can be connected with the fine of *Philadelphia* in 1822. I admit that if *Edward*, or any issue of his had been then living, it would have had effect, although no authority has been produced to shew that it would. In *Hawkins v. Kemp* (a), a case as to powers, it was held, that the defect of one deed could not be supplied by another; and the principle of it applies to this case. The fine of *Edward* only operated by way of estoppel to himself and his issue. There is nothing to shew that the covenant in 1780 is connected with the fine of 1822.

The fine of *Edward* cannot be considered that species of agreement or consent upon record which the statute

(a) 3 *East*, 410.

requires. I contend that the case is within the statute. The conveyance is to *Watkins* and his heirs alone, and he was possessed of it as his own estate, subject to the mortgage then outstanding. If Mrs. *Constable* had been the purchaser, she would have had to pay the mortgage; but *Watkins* was the person who was to pay the mortgage-money, and he was to pay Mrs. *Constable* an annuity for her life. Mrs. *Constable* took an assignment of the mortgage, but took *Watkins's* covenant to pay it. The statute was framed for the purpose of preventing a wife, who had acquired an estate from the provision of the husband from disposing of it. That statute has been construed liberally in favour of the cases which come within the principle, although not within the letter. There is not, I admit, a case exactly similar to this, but there are cases involving the same principle. One of the considerations given to the husband was a sum of money. It is not the money consideration given by the friends of the wife that will take the case out of the statute.

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WATKINS
v.
LEWIS.

Cur. adv. vult.

The MASTER of the ROLLS.

March 9.

This is a settlement of the equity of redemption only. If *William Watkins* had paid off the 1500*l.*, he could have kept it on foot against the settlement. The whole consideration for the equity of redemption was paid by the sister of the wife.

This case is in words within the statute, as the estate was in words and in strictness of law a purchase by the husband. But it is equally clear, that it is not within the spirit or the equity of the statute. The statute was made to prevent a widow from parting with an estate tail actually coming from the husband or his ancestors to the disherison of his heirs; but this equity of redemp-

1830.
 WATKINS
 v.
 LEWIS.

tion, the only property settled, never came from the husband or his ancestors, but was provided substantially and entirely by the wife's sister. Now it has been decided several times (if any thing could be wanted for such a point), that a case, though within the words of the statute, may not be within the spirit; and this is one of the cases not within the spirit of the statute. And I am of opinion, therefore, without adverting to the other circumstances of the case, that this bill must be dismissed, and with costs.

Reg. Lib. 1830. B. p. 1196.

ROLLS.
 July 8.

LIVESEY v. HARDING.

LIVESEY v. BECKETT.

Heir at Law.
Practice.
Cross Re-
mainders.
Trustee.

An heir at law in his answer to a bill to establish a will, admitted that the will

was well executed, and the sanity of the testator. The heir died, and the bill was revived against his brother, who disputed the execution of the will, and the sanity of the testator: Held, that the Court would not allow him to do so.

A gift to daughters, and the heirs of their bodies as tenants in common; and if only one, to such only daughter and the heirs of her body, with remainder to the testator's right heirs:

Held, that there were cross remainders between the daughters.

The testator having directed his two trustees to apply a moiety of rents or such part as they or he should in their or his discretion see fit in the maintenance and education or advancement in life of his younger children during the life of his wife; and one of the trustees having died, the Court would not interfere with the discretion to be exercised by the surviving trustee.

life of his younger children or child, and the issue of such of them as should die in the lifetime of his said wife, as to them or him should seem eligible during the natural life of his wife; and subject to that and some other payments, he gave and devised his estates unto his said trustees, their heirs and assigns, to the use of his eldest or only son for and during the term of his natural life; remainder to the said trustees to preserve contingent remainders; and from and after the decease of his said son, to the use of such child or children, or remoter issue of his said son, as he should appoint in the manner in the said will mentioned, and subject thereto, to the use of the first and all and every other son and sons of his said son in tail in succession; remainder to the daughter and daughters of his said son in tail; and in default of such issue of his said son, to the use of all and every the daughter and daughters of him the said testator, and the heirs of their bodies, to take as tenants in common, if more than one, equally, and if but one, to the use of such only daughter of him the said testator, and the heirs of her body for ever; and for default of such issue, to the use of his heirs for ever.

1830.

LIVESEY
v.
HARDING.

The testator appointed his trustees guardians of his children and executors of his will.

He left *Edmund Worthington Livesey*, his eldest son and heir-at-law, and *Mary Carter Livesey*, *James Worthington Livesey*, *Harding Livesey*, and *Eliza Armstrong Livesey*, his only younger children.

The bill prayed that the will might be established.

Edmund Worthington Livesey, the heir-at-law, by his answer, said, that the will was not made according to the instructions and intentions of the testator, it being

1880.

LIVESKY
v.
HARDING.

his intention, that on failure of issue of the eldest son, the property should go to his younger sons and their issue successively before the daughters; but this Defendant admitted that the testator was in a sound state of mind when he executed his will, and that the same was duly executed as by law is required for passing freehold estates.

James Worthington Livesey, by his answer, disputed the will, alleging that the same was not made agreeably to the instructions given by the testator, and said that the testator was addicted to excessive intemperance, and was in a state of derangement and utter incapacity to manage his own affairs, except at times.

The bill was replied to, and further proceedings had therein.

Edmund Worthington Livesey died unmarried, leaving the Plaintiff *Mary Carter Livesey*, the only surviving daughter of the testator, *Eliza Armstrong Livesey*, the other daughter, having died before *E. W. Livesey*, without issue.

The suit was revived, and *James Worthington Livesey*, the eldest brother and heir-at-law of *E. W. Livesey*, and also heir-at-law to the testator, in his answer to this bill of revivor, said, that since the filing of the original bill he had discovered, and verily believed the truth to be, that *Edward Livesey*, at the time of making his will, was not of sound mind, memory, and understanding, or, at any rate, that he was acting under an undue influence exerted over him by the Defendants *William Harding* and *John Harding*, and by *Archibald Keightley* the elder, the solicitor and brother-in-law of the Defendant *John Harding*.

Mr. Agar, Mr. Preston, and Mr. Duckworth, for the Plaintiff, cited *Tucker v. Phipps*. (a)

1890.

LIVESSEY

v.

HARRING.

Mr. Treslove and Mr. Ward, for Mr. Livesey, cited *Sleeman v. Sleeman* (b) and *Cartwright v. Cartwright*. (c)

The MASTER of the ROLLS. The heir-at-law has admitted the will to have been well executed, and the sanity of the testator at the time of making the will. Has any thing occurred to authorise the Court to relieve him from the admission? Must not the Court infer that the heir-at-law had made every necessary enquiry in order to obtain information before he made the admission? Is it possible, then, to allow a succeeding heir to dispute the will? I cannot follow the cases that have been cited. Mr. *Dickens* was not a very accurate reporter. The brother is bound by the admission made by the heir-at-law. I cannot direct an issue *devisavit vel non*, but Mr. *Livesey* is entitled to make what use he can of the question of construction.

Declare one moiety of the rents and profits to be applied to the maintenance of the younger children during the life of the wife.

The application of it is left to the discretion of the trustees, as they or he shall think fit. I could only make a declaration in the words of the will. One of the trustees is living. The discretion is vested in the surviving trustee.

Mr. Agar then, on the question of cross remainders, cited *Watson v. Foxon* (d), *Green v. Stevens*. (e) One of the daughters, who survived the testator, is dead, and

(a) 3 *Atkins*, 359.(b) 2 *Dickens*, 787.(c) 2 *Dickens*, 545.(d) 2 *East*, 36.(e) 17 *Ves.* 64.

1830.

LIVESEY

v.

HARDING.

according to the doctrine of cross remainders, the whole is now in the surviving daughter.

Mr. Preston. There is sufficient in the will for cross remainders. Cross remainders are, from the words in default of such issue, or any like expression, to be implied between two, but not where there are more than two; but if there be a gift to a class of persons, the rule of cross remainders applies. This is a gift to a class of persons who may be more or less than two.

Mr. Treslove contended, that there was no ground for inferring cross remainders.

The MASTER of the ROLLS. The gift over here is in default of issue; that is what I most rely upon.

July 16.

The MASTER of the ROLLS. The question is, whether any part of the estate should go over so long as there is issue of any of the daughters? I think the cases upon this subject have been very absurd in drawing the distinction that cross remainders should be implied when there are only two, but not where there are more than two. I own I am of opinion that no part of this estate is to go over as long as there are issue of any one of the daughters.

The cause then stood over for judgment to the following *Monday*.

July 19.

The MASTER of the ROLLS. In this case the testator had limited his estate in remainder to his daughters in tail, and if but one, then to her in tail; and in default of such issue, then to his own right heirs. I am of

opinion that no part of the estate goes over until there be a general failure of issue of all the daughters; and, consequently, I hold there are cross remainders between them.

1830.

LIVESLEY
v.
HARDING.

Decree, that according to the true construction of the will, there were cross remainders between the two daughters of the testator, and that *Mary Carter Livesley*, the surviving daughter, is entitled to the whole estate of the testator as tenant in tail thereof.

Reg. Lib. 1830. B. 2497.

DAWSON and Others v. HEARN and Another.

WESTMINSTER
HALL.

June 14.

WILLIAM HEARN, by his will, bearing date the 7th day of *September* 1823, *inter alia* gave and bequeathed as follows: — “ I also direct, that from and

Will.
Annuity.

out of my monies and personal estate, an adequate sum be, within three calendar months next after my decease, laid out and invested in the purchase of a government annuity of 250*l.* per annum, in the name and for the use of my said wife during her life; and I further will and direct, that in case my personal estate shall prove insufficient to purchase, and pay and satisfy the annuities and several pecuniary legacies hereinbefore by me directed and given, I charge and make subject my said estate at *Singleborough* with and to the deficiency therein.

A testator directed that an annuity of 250*l.* should be purchased for his wife within three months after his decease. She survived him seven months, but the annuity had not been purchased at the time of her death.

Her personal representatives filed their bill for payment of the value of the annuity at the time at which the testator had directed it to be purchased, and the Court decreed accordingly.

But if an annuitant has received the annual sum, the Court will direct an enquiry whether the annuitant elected to take the annuity from the person who was directed to purchase it, instead of the principal sum.

1830.

DAWSON

v.

HEARN.

All the rest and residue of my personal estate I give to my brother *William Hearn*, to be disposed of amongst his children and grandchildren, as he may think fit; and I nominate and appoint my said brother *William Hearn*, and nephew *Thomas Hearn*, executors of this my will."

The testator died on the 28th day of *April* 1827, and his wife died in *November* following, having previously bequeathed her personal estate to her two sisters, one of whom is a Plaintiff to this suit, and the other sister has since died, leaving the other Plaintiff her executor.

The annuity was not purchased. The bill stated the preceding facts, and prayed that it might be declared that the Plaintiffs were entitled to be paid from the assets of the testator, such sum of money as would have been required at the expiration of three months after his decease to purchase a government annuity of 250*l.* during the life of *Susannah Hearn*, the widow of the testator, with interest thereon from that time. The Defendants by their answer said, that no sum of money was ever invested in the purchase of an annuity for the said *Susannah Hearn*, deceased, or paid to her in respect of the sum required for the purchase of the annuity of 250*l.* in the said bill mentioned; for that at the death of the said testator, his assets consisted principally of money out on securities, which could not be immediately got in, and that at the end of three months after the death of the said testator, they had not possessed assets sufficient to purchase the said annuity, and that the funds were then very high, and that the health of the said *Susannah Hearn* was then very precarious, and the Defendant *Thomas Hearn*, who principally acted in the executorship, therefore informed the said *Susannah Hearn* of his intention to postpone the

purchase of the said annuity, and told her, he doubted not that she would feel satisfied with the security of the said *William Hearn* (his father) and himself, as executors of the testator, for payment of the said annuity in the mean time, or to that effect; to which she made no objection; and the Defendants admitted sufficient assets to purchase the annuity.

1880.

DAWSON
v.
HEARN.

Mr. Bickersteth and *Mr. Swanston* for the Plaintiffs.

Had a sum of money, equal in value to the annuity, been given to *Mrs. Hearn*, it would have vested in her; and the ground on which the Court gives the representatives of an annuitant what the purchase would have cost is, that the annuitant might, when the annuity is purchased, sell it if she pleases. The reasoning of the answer, that the stocks were high, could not deprive her of her rights. *Palmer v. Crawford* (a), *Bayley v. Bishop* (b), *Yates v. Compton* (c), *Barnes v. Rowley*. (d)

The bequest of a sum for the purchase of an annuity entitles the legatee to the specific sum. When the time arrived (three months), it was clearly ascertained what sum was requisite, and by the bequest *Mrs. Hearn* became entitled to a legacy equal to the sum which would have been requisite to purchase the annuity at the end of three months from the death of the testator.

Mr. Pemberton and *Mr. Turner* for the Defendants.

Where there is no bequest of a principal sum, but only of an annuity, the principle contended for cannot apply. The purchase of an annuity depends upon the

(a) 3 *Swanst.* 482.

(c) 2 *P. W.* 309.

(b) 9 *Ves.* 6.

(d) 5 *Ves.* 305.

1890.

DAWSON

v.

HEARN.

health of the annuitant, and other circumstances may influence the value.

Suppose the executors had purchased the annuity some months after the expiration of the three months, and stocks in the mean time had fallen, would the executors have been liable for the difference? A passage has been read from the answer explaining what the circumstances were which prevented the purchase of the annuity, and that the annuitant did not object to the security of the testator's estate, and to receive the annuity from it. It is plain from this will, that the testator meant that this should be an annual provision for the wife. He gave her other legacies. Can it be said, that as she did not choose to make her election to have the annuity purchased, her representatives can elect now?

All the cases, except that of *Sales v. Compton*, are bequests of principal sums. In that case, *Jane Stiles*, the annuitant, was entitled to the whole produce of the real and personal estate; and the question was, whether the estate did not remain unconverted? The decision was, that the realty was converted. The cases cited do not apply.

The testator meant to make a provision for his wife for her life. Now what is the practice of the Court? It sets aside a sum to answer the annuity. The only exception is an insolvent estate, in which the Court has directed an annuity to be purchased in the government securities. Now, if a party makes no claim, but submits to receive the annuity, the representatives of that party cannot quarrel with the acts of the person whom they represent. The party who had the power has

entered into the arrangement, and her representative cannot quarrel with it.

1830.

DAWSON

v.

HEARN.

The MASTER of the ROLLS. It can make no difference whether a certain sum is given to purchase an annuity, or a certain annuity is directed to be purchased; and the Court considers it a legacy to the amount of its value: but the annuitant may waive it, and receive the annual sum from the executors.

In a case which occurred last term (a), the annuitant had received the annuity for some time, and I directed an enquiry, whether she had elected to take the annuity, but here, it is not contended by the answer of the executors that the annuitant waived the right of having the annuity purchased; the answer states that they proposed to postpone the purchase. On the part of the annuitant, it was at most but a mere assent to a proposal to receive the annuity until the purchase was made, and consequently she still continued entitled to the sum which would have been requisite for the purchase of the annuity, and her representatives are now entitled to that sum.

(a) BROWN v. ROSS.

May 6.

This suit was on a direction in a will, that a sufficient sum should be set apart for the purchase of an annuity of 750*l*. The Defendant by his answer stated that he had from time to time paid the annuitant the growing payments of the annuity during her life, and that such payments were received by the annuitant in full satisfaction of the annuity. The Court directed an enquiry, how it happened that the annuity was not purchased, and whether the widow assented; with liberty to state special circumstances.

The report is nearly ready, and this case will shortly be heard on further directions.

1830.

DAWSON

v.

HEARN.

It does not appear that the executors communicated their reasons to the annuitant.

Let the Master enquire what sum would have been required at the expiration of three months from the death of the testator to purchase a government annuity of 250*l.* during the life of *Susannah Hearn*; and declare that the Plaintiffs are entitled to the sum that would have been so required, with interest at 4*l.* per cent., and that the Defendants pay unto the Plaintiffs the said sum and interest, with their costs.

Reg. Lib. 1830. A. p. 1902.

ROLLS.

July 7.

CHARLES MARRIOTT, - - Plaintiff;

AND

THOMAS SNEYD KINNERSLEY, THOMAS MEGGISON, CHARLES KAYE, and JOHN WESTCOTE BAMPFIELD, and ELIZABETH, his Wife, MARY MEGGISON, Widow, JOHN MIDDLETON MEGGISON, and HENRY CUBITT, - - Defendants.

Trustees.

*Liability for
acts of Co-
Trustees.*

Trustees of stock signed a power of attorney to sell it out, and the proceeds were received from the broker by one of the trustees, who afterwards became insolvent: Decree, that the other trustees account for and pay the amount.

ELIZABETH MARRIOTT, the mother of the Plaintiff, sold out some *East India* bonds which had been given to her by the Defendant *Kinnersley*, and invested the produce in the purchase of 3620*l.* 3*s.* 4*d.* three per cent. Consols, in the names of Defendant *Kinnersley*, Defendant *Charles Kaye*, and Defendant *Thomas Meggison*, and caused to be effected on the 24th of *February* 1814, with the Equitable Insurance Company, a policy of insurance for 2000*l.* on her life. By indenture bearing date 7th of *May* 1815, made between *Elizabeth Marriott* of the one part, and those three

Defendants of the other part, *Mrs. Marriott* assigned the policy to the three Defendants, and it was thereby declared that they should stand possessed of the 8 per cent. Consols, and the dividends thereof, and the policy of insurance, upon trust to vary the stocks, and out of the dividends from time to time to pay the premium of insurance, and to apply the whole or such part as they should think fit of the residue in the maintenance and education of the Plaintiff until he should attain twenty-one, and to invest the surplus; and on the Plaintiff coming of age to transfer the whole to him. In this deed there was a proviso that the trustees should not be answerable for any misfortune, loss, or damage in the execution of the trusts, except the same should happen by or through their own wilful default respectively. The payment of the premium on the policy was discontinued in 1819.

1830.
 }
 MARRIOTT
 v.
 KINNERSLEY.

The trustees executed a power of attorney on the 9th of *May* 1819, enabling *Henry Vigne* and *Frederick Vigne* to sell out the stock. The produce was received by the Defendant *Charles Kaye*, who afterwards became insolvent.

The Defendant *Kinnersley* did not execute the trust-deed.

The bill prayed that it might be declared that the Defendants *Kinnersley*, *Meggison*, and *Kaye* had committed a breach of trust, and that they should replace the stock and dividends, and the policy of insurance.

The Defendants *Kinnersley* and *Meggison* never received the dividends, nor interfered in the trusts, further than that *Meggison* executed the deed and power of attorney, and *Kinnersley* the power of attorney only.

1830.
 }
 MARRIOTT
 v.
 KINNERSLEY.

Defendant *Kinnersley* stated in his answer, that he had no knowledge of the deed, to which he never assented that he should be made a party, and that he had not in any manner authorised any person to name him a trustee therein; that he never executed or saw the deed, or any draught or copy thereof, or consented to become a trustee thereunder; nor did this Defendant know, nor had he reason to believe, that any trusts had been declared in favour of the Plaintiffs; this Defendant also said, that he refused to allow the stock to be purchased in his name, and that not knowing that the stock was invested upon any other trust than for Mrs. *Marriott*, and believing she had the entire control of it, he did, at the request of the Defendant *Kaye*, who was her solicitor and agent, execute the power of attorney, which he delivered to the Defendant *Kaye*.

The Defendant *Meggison* died, and the bill was revived against his representatives.

It appeared that the application of the Defendant *Kaye*, to the Defendant *Kinnersley*, to execute the power of attorney, was by letter, wherein occurs this passage: "It becomes necessary for the advancement of *Charles Marriott* the Plaintiff, that the stock should be sold out."

Mr. *Pemberton* and Mr. *Beames* for the Plaintiff.

Mr. *Kaye* having determined to appropriate the stock to himself, wrote a letter to Mr. *Kinnersley*, desiring him to execute a power of attorney. Mr. *Kinnersley* incautiously executed the power of attorney. A person who is appointed trustee with his consent can only discharge himself by applying the fund as the *cestuique*

BEFORE THE MASTER OF THE ROLLS.

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trust may direct, or by transferring it to other persons by the direction of the *cestuique trust*. He has acted, and is therefore liable.

1890.
MARRIOTT
v.
KINNERSLEY.

Mr. *Meggison* signed the deed, and he was bound to see to the proper application of the funds. He chose to trust to Mr. *Kaye*, and his estate must answer for the loss sustained. Mr. *Kinnersley* says in his answer, that he had no distinct notice of the trust reposed in him; but the letter of Mr. *Kaye* is evidence that he had notice, for there he calls upon him to join in an act for the purpose of raising money, which was represented to him to be in conformity to the trusts. The very act of transferring was such an act as amounted to an acceptance of the trusts.

Mr. *Barber* for a Defendant in the same interest.

Mr. *Tinney* for Mr. *Kinnersley*.

Mr. *Charles Kaye* was the confidential solicitor of Mrs. *Marriott*, now Mrs. *Bampfylde*, and he informed Mr. *Kinnersley* that the funds were transferred into his name. Now Mr. *Kinnersley* knew of no trust deed, nor of any trust, but for Mrs. *Marriott*. *Charles Marriott* was only a natural son of Mrs. *Marriott*; and a person who creates a voluntary trust may discharge it, this was decided by Lord *Eldon* in the case of *Walwyn v. Cooke*, 3 *Mer.* 707., and therefore I ask your Honour to direct an enquiry whether Mrs. *Marriott* did any act by which the trusts might be discharged, by which Mr. *Kinnersley* might be discharged from these trusts.

Mr. *Wright* (with Mr. *Tinney*). This trustee was not liable to the acts of the other trustees. *Bacon v.*

1830.

 MARRIOTT
 v.
 KINNERSLEY.

Bacon. (a) Trustees are not liable to the consequences of any thing they do for the sake of conformity. *Hoary and Blakeman* (b), *Chambers and Minchin.* (c)

Mr. Bickersteth and *Mr. Swanston* for the representatives of *Mrs. Meggison*.

Unfortunately the question is too clear; and the only question is as to the consequences: the money is gone by the fraud committed by *Mr. Kaye*, but *Mr. Kinnersley's* liability is as great as *Mr. Meggison's*.

The MASTER of the ROLLS.

Mr. Meggison chose to confide in *Mr. Kaye* contrary to his duty, and he must suffer for *Mr. Kaye's* neglect or default. *Mr. Kinnersley's* case is very hard, but the question is, whether *Mr. Kinnersley* has not incautiously done an act which has placed this property in the hands of individuals who have abused it. *Mr. Kinnersley* will be charged with no dividends prior to his acting, nor will he be charged with the loss sustained by the neglect about the policy; he is only liable to the fund transferred, but *Mr. Meggison's* representatives must be charged with a general breach of trust, with the loss sustained by the discontinuance of the policy, and must pay costs. But I will not charge *Mr. Kinnersley* with costs, I give the costs against the executors of *Mr. Meggison* and against *Mr. Kaye*.

With respect to what the counsel for *Mr. Kinnersley* has said about Lord *Eldon's* doctrine, he has mistaken it. If there be communication between a trustee and a person for whose benefit a trust is created, then the trustee is liable to him; but he is only not so when

(a) 5 Ves. 531.

(b) 4 Ves. 595.

(c) 4 Ves. 185.

there is not that communication; this applies to conveyances upon trust for creditors.

The stock itself must be replaced.

Reg. Lib. 1829. B. p. 2712.

1830.

MARRIOTT

v.

KINNESSLEY.

WINTER v. HICKS.

February 15.

THIS was a suit instituted by a creditor against the administrator and heir at law of *Mark Hicks* the intestate; and it was charged in the bill, that the intestate at the time of his death was a trader within the true intent and meaning of the bankrupt laws. It appeared by the Master's report, that the personal estate possessed by the administrator amounted to 170*l.* 11*s.* 10*d.*, and that the administrator had paid several sums of money in respect thereof to the amount of 64*l.* 3*s.* 11*d.*, leaving a clear balance of 106*l.* 7*s.* 11*d.*, which, being insufficient for the payment of 232*l.* 8*s.*, the amount of the intestate's debts, the Master had ordered the real estate to be sold, and the produce of such sale, with the rents and profits, amounted to 332*l.* 6*s.* 9*d.*, which had been first applied in the payment of 301*l.* 4*s.* 1*d.*, the principal and interest due on a mortgage thereof, leaving a balance of the real estate to the amount of 31*l.* 2*s.* 7½*d.* The administrator being himself a creditor, had, in the accounts which he had carried in before the Master, claimed to retain the amount of his own debt.

Debt due to administrator.

Intestate trader.

Costs.

—
An administrator having claimed his debt before the Master, that is sufficient to entitle him to retain it.

The administrator entitled to his costs out of the produce of the sale of a real estate, his intestate having been a trader.

The heir at law entitled to his costs from the Plaintiff, who may be reimbursed out of the fund in court, without prejudice to the costs of the administrator.

Mr. *Milford*, for the Plaintiff, contended, that as the estate of the intestate was insolvent, the administrator was not entitled to have his costs out of the fund; and in support of that doctrine, cited *Wilkins*

1830..

WINTER

v.

HICKS.

v. *Hunt.* (a) He further contended, that the administrator not having distinctly retained his debt, before the suit was instituted, he was not now entitled to do so.

The MASTER of the ROLLS decided, that the administrator was entitled to his costs, and that the administrator having claimed his debt before the Master, that was sufficient to entitle him to retain it.

Mr. K. Parker, for the heir at law, applied for his costs.

It was ordered, that the Plaintiff should pay his costs, and receive it over out of the fund without prejudice to the costs of the administrator.

(a) 2 *Atkyns*, 151.

ROLLS.

May 26.

Contingent
bequest to
infants.

Maintenance.
Guardians.

Bequest of
10,000*l.* pro-
vided the
legatee attain
twenty-one.

In a sub-

sequent part of the will the testator appointed guardians, whom he requested to attend particularly to the education and well being of the legatee, and see that she was properly and virtuously brought up and educated:

Held, that the interest of the legacy was applicable to the maintenance of the legatee, but the principal was contingent.

The legatee being a natural child, the testator had no power to appoint guardians for her, but the persons named in the will being well known to the Court as proper persons, they were appointed guardians without a reference to the Master.

MILLS v. ROBARTS.

GEORGE JAMES ROBARTS, by will bearing date the 24th of November 1823, after giving to Plaintiff and Abraham Wildey Robarts a sum of 8000*l.* in trust to pay the interest to Mary Anne Harben during her life; and after mentioning that he had by a certain deed placed in the names of trustees the sum of 10,000*l.* 3 per cents for the use of said M. A. Harben during her life,

gave and bequeathed the said sum of 10,000*l.* after the decease of *M. A. Harben*, to be equally divided between her two children, *Georgiana Charlotte Harben Roberts* and her infant brother *James George Harben Roberts*, for their joint use and benefit for ever. In the event of their both dying before they attained twenty-one, then over. He also bequeathed to the same two children, after the decease of their mother, in equal proportions, the sum of 8000*l.* before mentioned, subject to the same bequest over in the event of their dying under twenty-one years. After another bequest, the testator proceeded as follows:—

1830.
 —————
 MILLS
 v.
 ROBERTS.

“ I will and bequeath to my daughter *Georgiana Charlotte Harben Roberts*, daughter also of the above-named *M. A. Harben*, the sum of 10,000*l.* sterling for her own absolute use and benefit, *provided* she attains the age of twenty-one years; but in default of this, I will and bequeath the said 10,000*l.* sterling to her brother *James George Harben Roberts*, provided also he attains the age of twenty-one years; but in default of this, I will and bequeath the said 10,000*l.* to my nephew *Henry Roberts* and his heirs for ever.” This was followed by a bequest of another sum of 10,000*l.* in similar terms to *James George Harben Roberts*, remainder over to his sister in the event of his dying under twenty-one, remainder to *Henry Roberts* in the event of both dying under that age.

In a subsequent part of his will the testator proceeded thus:—

“ I constitute and appoint my brother *Abram Wildey Roberts*, and my much esteemed friend *Charles Mills jun.* of *Birchin Lane*, trustees and guardians to the several persons before named in this my last will and

1830.
 {
 MILLS
 v.
 ROBERTS.

testament; and I earnestly request and implore, that they would have the goodness to act, and to attend particularly to the education and well-being of *Georgiana Charlotte Harben Roberts*, and see that she is properly and virtuously brought up and educated. And I further will and direct, that the said *Georgiana Charlotte Harben Roberts* is on no account to dispose of herself in marriage without the consent of her guardians either before or after she attains twenty-one, on pain of forfeiting two thirds of the value of the legacies bequeathed to her."

The testator appointed his brothers and sisters residuary legatees; and *Mills* and *Abram W. Roberts* executors.

The bill was filed by one of the executors to ascertain the interest of the parties in the two legacies of 10,000*l.*, and praying also that guardians might be appointed for the infants, and the funds secured; and the principal question was, Whether the children were to be allowed maintenance out of the interest of these legacies, no other provision being made for their maintenance? The children were illegitimate.

Mr. *Pemberton* and Mr. *Roots*, for the infants, insisted that the clause directing the trustees to attend to the education and well-being of the daughter, and appointing them guardians, clearly shewed that that legacy must be considered as vested, subject to be divested in a certain event; and cited *Branstrom v. Wilkinson* (a), *Acherley v. Wheeler and Vernon*. (b)

Mr. *Tinney* and Mr. *Rolfe* for the residuary legatees, argued, that the testator having bequeathed the first two

(a) 7 Ves. 421.

(b) 1 P. Wms. 785.

legacies of 10,000*l.* and 8000*l.* in such manner as to make them vest (subject to the mother's life-interest), and by making the two latter legacies of 10,000*l.* contingent, had drawn a distinction which sufficiently indicated his intention not to give the children the interest of those two legacies in the mean time. And they concluded that the appointment of guardians might have reference to the event of the mother's dying during the minority of the children, in which case they would be provided for out of the interest of the two first legacies of 10,000*l.* and 8000*l.* which were vested.

1830.

 MILLS
 v.
 ROBERTS.

Mr. Heathfield, for Henry Roberts.

The MASTER of the ROLLS. Upon this will, it is perfectly plain these children were not intended to take the two sums of 10,000*l.* unless they attained the age of twenty-one; but the question is, Whether, in other parts of the will, the testator has not used expressions which manifest that he intended they should take the interest of those sums in the mean time?

Now he appoints trustees and guardians, and they are to have the charge of the education of these three children. Could the testator intend that these trustees should educate the children from their own property? and must it not be intended that he meant they should be trustees of the infants' property, to hold it for their benefit, provided they should attain twenty-one, and to apply the produce of it in the mean time to their education? The case of *Branstrom* and *Wilkinson* is an express authority to this effect, and the words "when they shall attain the age of twenty-one years," provide for the same contingency as the words here used.

1830.

MILLS

v.

ROBERTS.

Declare that they are entitled to the interest from the testator's death.

The fund to be secured.

Mr. *Pemberton*. There must be a reference to the Master to appoint guardians, because the testator was not by law empowered to appoint guardians for the infants.

The MASTER of the ROLLS said he should appoint these gentlemen at once to be guardians of the children, knowing them to be proper persons for such a trust.

His Honor added, that he did not declare the legacies to be vested, for they were contingent on the event mentioned in the will, but that the interest should be applied to the maintenance and education of the infants.

Decreed that the infants were entitled to interest on the legacies from the death of the testator, and in case either of them should die under twenty-one, any of the parties were to be at liberty to apply. That the Plaintiff and *A. W. Roberts*, on entering into a recognizance to account, be appointed guardians of the infants during their minorities, and until the further order of the Court; and that the Master inquire what will be fit to be allowed for the maintenance and education of the infants for the time passed since the death of the testator, and the time to come.

Reg. Lib. 1829. B. p. 1958.

1830.

MARIA MELLER and ELLEN RICHARDSON,
 Executrixes of JOHN SAMUEL MELLER, de-
 ceased, - - - - - Plaintiffs;

AND

JOHN LEWIS MINET, ISAAC MINET, JOHN
 STRIDE, HENRY COOPER, MARGARET
 MELLER, WILLIAM BECKETT, and HENRY
 CIPRIANI, - - - - - Defendants.

May 7.

JAMES MELLER, by his will, bearing date the
 3d December 1816, gave his residuary estate unto
 his executors, the Defendants *Beckett* and *Cipriani*,
 upon trust to pay the dividends to his wife for life, and
 after her death, to pay the dividends to the testator's
 son *J. S. Meller* during his natural life; and after the
 decease of testator's wife and son, upon trust to pay,
 assign, transfer, and make over the testator's residuary
 estate unto such person or persons, and to and for such
 use and uses as the said *J. S. Meller*, at any time or
 times, and from time to time during his life, by any
 deed or deeds, writing or writings, with or without
 power of revocation, to be by him sealed and delivered
 in the presence of, and to be attested by, two or more

*Fraud.**Appointment.**Next of kin.**Costs.*

—
J. S. M. being
 entitled to the
 dividends of
 4,500*l.* for
 life, with a
 power to
 appoint by
 any deed or
 writing the
 principal after
 his death, and
 in default of
 appointment,
 to his next of
 kin, and being
 in prison for
 debt and in

great distress, is prevailed upon by *H. C.* to enter into an agreement for sale of the
 principal after his death, in consideration of 1000*l.*, and other sums therein stated
 to have been previously lent and advanced to him by *H. C.*

By a subsequent deed, in consideration of 1854*l.* therein stated to be due from
J. S. M. to *H. C.*; and of 1000*l.* paid by *J. L. M.* and others, *J. S. M.* by the
 direction of *H. C.*, appointed that the principal should on his death be transferred
 to *J. L. M.* and others, with a proviso that they should assign the same to *H. C.* on
 payment of 1000*l.* and interest, and all further advances.

The 1854*l.* or any part of it had not in fact been advanced by *H. C.* :

Held, that this was a clear fraud :

Held, that the appointment was well executed.

That the next of kin of *J. S. M.* had no claim.

That *H. C.* was a trustee for the personal representatives of *J. S. M.* for the
 excess beyond the money received by *J. S. M.*

That *H. C.* should pay costs.

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credible witnesses, or by his will as therein mentioned should direct or appoint the same, and in default of appointment, to the testator's next of kin.

The residue consisted, amongst other property, of the sum of 4300*l.* Navy 5 per cent. annuities, since converted into 4515*l.* New 4 per cent. annuities. In *March* 1822 *J. S. Meller* was in great distress, and confined for debt in the Fleet prison.

The following agreement was there executed between *J. S. Meller* and the Defendant *Henry Cooper* : —

“ An agreement made the 16th day of *February* 1822, between *John Samuel Meller*, of *Welbeck-street* in the county of *Middlesex*, Esq., of the one part, and *Henry Cooper*, of *Copthall-court* in the city of *London*, merchant, of the other part, as follows : — Whereas the said *John Samuel Meller*, under the last will and testament of his father *James Meller*, late of *Howland-street, Fitzroy-square*, in the county of *Middlesex*, Esq., deceased, is entitled to the right of disposing either by will or deed, amongst other sums, the sum of 4300*l.* Navy 5 per cent. annuities, now standing in the names of *William Beckett, Henry Cipriani, and Mary Meller*, in the books of the governor and company of the Bank of *England*, as trustees under the said will ; and the same annuities will be transferable on the decease of the said *John Samuel Meller*, but not sooner, being a part of the residue of the personal estate of the said *James Meller*, deceased. And whereas the said *John Samuel Meller* now stands indebted to the said *Henry Cooper* in several sums of money, by the said *Henry Cooper* lent and advanced to him from time to time, and having occasion for a further sum of money, hath contracted and agreed to sell and convey the said 4300*l.* Navy 5 per cent. annuities to the said *Henry Cooper* for the further sum of

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witnessed, that in consideration already lent and advanced by the said *Henry*, in consideration of the be paid by the said *Henry* administrators, to the said *John* time or times, and in manner, he the said *John Samuel Meller* do promise and agree to and with the said his executors, administrators, and assigns, said *John Samuel Meller* shall and will, at times hereafter, at the request, costs, and of the said *Henry Cooper*, his executors, administrators, or assigns, convey, transfer, or assign, or act to be conveyed, transferred, or assigned, the said sum of 4900*l.* Navy annuities, transferable on his decease as aforesaid to any person or persons, and by any deed or deeds, and in such parts or portions thereof as the said *Henry Cooper*, his executors, administrators, or assigns shall by deed name, appoint, or direct. And the said *Henry Cooper* for himself, his executors and administrators, doth hereby promise and agree to and with the said *John Samuel Meller*, that in consideration of conveyance or assignment, conveyances or assignments, direction or directions to be made by the said *John Samuel Meller* as aforesaid, that he the said *Henry Cooper* shall and will pay, or cause to be paid unto the said *John Samuel Meller* the further sum of 1000*l.* at the time of his executing the said conveyance or assignment, which is to be completed on or before the 15th day of *March* next; and also executing at any time after such other conveyances or assignment, direction or directions, wholly or in part, and in proportion, and as the 4900*l.* Navy annuities shall be thereby respectively conveyed, assigned, or directed to be conveyed or assigned."

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By indenture bearing date the 20th day of *September* 1822, made between *John Samuel Meller* of the first part, *Henry Cooper* of the second part, and the Defendants *John Lewis Minet*, *Isaac Minet*, and *John Stride*, bankers, of the third part, reciting the will and agreement, and that upon the settlement of accounts between *Cooper* and *J. S. Meller*, the latter was, on the 16th of *February* 1822, indebted to *H. Cooper* in the sum of 1854*l.* 10*s.*, making, with the sum of 1000*l.*, the sum of 2854*l.* 10*s.* It is witnessed, that in consideration of the said sum of 1854*l.* 10*s.*, and of 1000*l.* paid to *J. S. Meller* at the request of *H. Cooper* by *J. L. Minet*, *I. Minet*, and *J. Stride*, he the said *J. S. Meller*, by the direction of *Cooper*, and by deed, sealed and delivered in the presence of two witnesses, directed and appointed that the sum of 4515*l.* New 4 per cent. annuities should, after the decease of him and *Mary Meller*, be transferred to *J. L. Minet*, *I. Minet*, and *J. Stride*, as their property; and he thereby directed and required the trustees to assign the same to them accordingly, with a proviso, that they should re-assign the same to *Cooper* on payment of 1000*l.* and interest, and all further advances to him by them.

J. S. Meller died on the 22d *December* 1822, having previously made his will, and thereby appointed the Plaintiffs executors thereof.

Mary Meller died on the 27th *October* 1823. The bill stated the preceding facts, and that *J. S. Meller* continued in the Fleet prison until the 13th of *June* 1822, and that up to that time *Cooper* had advanced to him 40*l.* only. The bill also stated, that the admission in the indenture, that *J. S. Meller* was indebted to *H. Cooper* in the sum of 1854*l.* 10*s.* was contrary to the

fact; and the bill prayed that the agreement of the 16th *February* 1822, and indenture of 20th *September* 1822, might be delivered up to Plaintiffs to be cancelled, the Plaintiffs thereby offering to pay to the Defendants *J. L. Minet, I. Minet, and J. Stride, and H. Cooper* the principal and interest which should be found *bonâ fide* due to them for monies advanced to *J. S. Meller* in his lifetime, on an account to be taken for such purpose; or that the indenture of the 20th *September* 1822 might stand as a security for the sum of 1000*l.* only and interest; and in that case, that Defendants *J. L. Minet, I. Minet, and J. Stride* might be ordered to re-assign the residue of the said sum of 4515*l.* new 4 per cent. Bank annuities, as the Court might direct, and that in the mean time the Defendants *W. Beckett* and *H. Cipriani* might be restrained by the order and injunction of the Court from transferring or parting with the said stocks, or any of them, and that the same might be secured by the order of the Court.

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When this cause came on first to be heard on the 28th *January* 1828, the bill was dismissed as against the mortgagees, whose demands on *Cooper* exceeded the amount of the security, and a reference was made to the Master, to enquire what sums were due from *J. S. Meller* to the Defendant *Cooper* on the 16th *February* 1822, the date of the agreement; also, what sums, if any, were paid by *Cooper* to *J. S. Meller* between the 16th day of *February* 1822 and the execution of the indenture of the 20th day of *September* 1822.

The Master reported, that he did not find that any sum of money was actually due from *J. S. Meller* to the Defendant *H. Cooper* on the 16th *February* 1822. And he did not find that any subsequent advances were made by the Defendant *H. Cooper* to *J. S. Meller* between

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the 16th *February* 1822 and the 20th *September* 1822, the date of the indenture in the pleadings mentioned inclusive.

Depositions were read in evidence, shewing the great distress of *J. S. Meller*, and that no such sum as 1854*l.* 10*s.* could have been due to *Cooper* at the time of executing the agreement.

Mr. *Bickersteth* and Mr. *Skirrow* for the Plaintiffs.

Mr. *Agar* and Mr. *Hayter* for the Defendant *Henry Cooper*.

The MASTER of the ROLLS.

J. S. Meller was entitled to the residue of his father's estate, consisting of the sum of 4300*l.* Navy 5 per cent. annuities.

At the time of the transaction in question he was a prisoner in the Fleet. The Defendant *Cooper* there treats with him for the purchase of this stock, and the transfer of it at the time of his death. An agreement is executed, stating that *Meller* was indebted to *Cooper*, and in consideration thereof, and of the further sum of 1000*l.* to be paid by *Cooper*, *Meller* covenanted that he would assign the 4300*l.* annuities to *Cooper*.

I referred it to the Master to enquire whether there was any thing due in respect of the debts so stated in the agreement to be due to *Cooper*. The Master has reported that there was not any sum due.

A clear fraud has been established against *Cooper*; he persuaded *Meller* to sell the reversion for 1000*l.*, and *Cooper*, in order that he might be enabled to procure

money upon it, and represent that he had given a fair value for it, persuaded *Meller* to allow it to be stated in the agreement, that he, *Meller*, was indebted to *Cooper*, and that the purchase was as well in consideration of the sum which he was so indebted as of the further sum of 1000*l*. *Cooper* took advantage of this poor man's distress.

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With respect to the Plaintiffs, the appointment by which they claim, was made under a general power, which was clearly well executed. The next of kin can have no claim. The mortgagees being no party to the fraud, the appointment to them cannot be impugned.

But is *Cooper* to escape? I am of opinion that the executors have duly filed their bill, and although they have not properly stated their prayer, yet under the prayer for general relief, they are entitled to such relief as the case made by the bill requires. I am of opinion that *Cooper* must be considered a trustee for *Meller* for the excess beyond the money received by *Meller* from *Cooper*; and there is so much fraud in this case, that *Cooper* shall pay the costs.

An account to be taken of the stock which has been possessed by *Cooper* or *Minet* and Co.

Decree that (after deducting what shall be found due to *Cooper* on account of the 1000*l*. and interest) the value of the stock and dividends be paid by *Cooper* to the Plaintiffs. Costs of suit and inquiries to be paid by Defendant *H. Cooper* to Plaintiffs.

Reg. Lib. 1829. B. 1502.

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ROLLS.
March 1.

PALMER v. SCOTT and Others.

Attorney and
Client.

Mortgage.

Proposal.

An attorney having received money for his client, and being owed on mortgage from another person the sum of 3000*l.*, wrote to his client that he had that mortgage in his hands, and having received the like amount for the client, he undertook when thereunto required, to execute a transfer of the same:

Held, that this was not mere proposal, and although there was no express acceptance, yet there being no refusal of the security, the client was entitled to all such interest as the attorney had therein.

THE Plaintiff having sold an estate, employed Mr. *Hampson*, a banker and solicitor in *Bedfordshire*; and a letter from the Plaintiff to him in *December* 1821, contained these words:—"You will recollect that I propose to lay all the money out upon mortgage." Mr. *Hampson* received for the Plaintiff in respect of the sale of this estate and some timber, the sum of 3361*l.* 15*s.*, and shortly afterwards he wrote and sent to the Plaintiff the following letter:—

"*Luton*, 27th *Dec.* 1822.

"My dear Sir,

"I have great pleasure in informing you that the *Farley* purchase is now finally settled. I have in the other side sent you the particulars, with the balance paid to me, amounting to 3261*l.* 15*s.* I will endeavour to obtain very soon a security for this sum; but if I should not be successful, I will transfer to you a mortgage of mine for 3000*l.* In the mean time I will engage to pay you 4 per cent. for the interest of the money until it is invested. I do assure you the settlement of this business has given me much gratification, because I consider that we have made Mr. *Crawley* submit to the original agreement.

"Yours sincerely,

"LEO. HAMPSON."

On the 14th of *April* 1823 and 14th of *June* 1823, the Plaintiff wrote letters to Mr. *Hampson*, pressing him to furnish his account; and in one of which he said, that several years had passed since a regular settlement had taken place between them.

On the 17th of *June* 1823 Mr. *Hampson* wrote to the Plaintiff that he would in a few days make out a statement of the account, and send it with a remittance for the balance, and an acknowledgment that he held in his hands a mortgage deed for 3000*l.*, with an undertaking to assign it to the Plaintiff when required.

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On the 15th of *July* 1823 Mr. *Hampson* sent to the Plaintiff a draft for 96*l.* 15*s.*, being the balance of the *Farley* sale, and on account of some timber sold, accompanied by the following document: —

“ 15th *July* 1823.

“ I acknowledge to have in my hands a mortgage deed made by *Thomas Nicoll* to me of an estate at *Studham* in the county of *Bedford* for securing the sum of 3000*l.* and interest. And having received this sum of *John Sharpe Palmer Esq.* (the Plaintiff) in *December* last, I do hereby undertake, when thereto required by him, to execute a transfer to him of this mortgage.

“ LEONARD HAMPSON.”

On the 16th of *July* 1823 the Plaintiff wrote to Mr. *Hampson*, acknowledging the receipt of the 36*l.* 15*s.*; and saying that he should be glad to receive a debtor and creditor account, which Mr. *Hampson* had promised on his return home.

In a letter of the 9th of *August* 1823, the Plaintiff alludes to a purchase he had made in *Essex*, and adds that it was absolutely necessary he should arrange his affairs, for which purpose he intended to go to Mr. *Hampson's* at *Luton*, where he resided.

On the 13th of *August* 1823 the Plaintiff wrote to Mr. *Hampson*, stating that he had not received an answer to his former letter, and that he should not have 3000*l.* to

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put out on mortgage, as he should want 1000*l.* to pay for his late purchase about the middle of *September*, and that he depended upon that, as the money was left in Mr. *Hampson's* hands as a temporary arrangement, agreeable to Mr. *Hampson's* desire. In *October* 1823 Mr. *Hampson* sent to the Plaintiff the sum of 1000*l.* The mortgage was never assigned to the Plaintiff; and in *March* 1824 Mr. *Hampson* died, and administration to his effects was granted to *Scott* and *Jones*, two of the Defendants, and they possessed themselves of the mortgage deed; but the Defendant *Williamson*, a partner of Mr. *Hampson* in his business of a solicitor, possessed himself of certain title-deeds relating to the estate in mortgage; and the surviving partner of Mr. *Hampson*, as a banker, having become bankrupt, his assignees, who were also Defendants, claimed some lien on the mortgage. The mortgage was in the possession of the administrators.

The bill prayed that the Plaintiff might be paid the balance due to him, or that the mortgage might be assigned to him.

Defendant *Williamson* disclaimed any interest in the deeds.

Mr. *Treslove* and Mr. *Rawlings* for the Plaintiff.

Mr. *Bickersteth*, Mr. *Tinney*, and Mr. *Barber*, for the Defendants.

The MASTER of the ROLLS.

A reference must be made to the Master to enquire what interest *Hampson* had in the mortgage.

The Plaintiff employed *Hampson* as his solicitor in this purchase. The Plaintiff informed *Hampson* of his intention to lay out the money on mortgage.

(His Honor then referred to the letters of the 27th of December 1822 and 15th of July 1823.)

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This is a positive agreement, and requires, therefore, no acceptance in writing. Where there is only a proposal made, it is necessary there should be an acceptance, but where there is a positive engagement, no acceptance is necessary. Unless refused, such engagement constitutes by itself an agreement which this Court will enforce. The letter of the 16th of July 1823 contains no refusal; on the contrary, the Plaintiff in another letter stated that he had accepted that security of *Hampson* as a temporary arrangement.

(His Honor then read the letter of the 13th of August 1823.)

The mortgage was to be a security until the 3000*l.* was invested by *Hampson*. There is nothing in the correspondence to shew that the Plaintiff refused it.

Declare, that the Plaintiff is entitled, as a security for what remains due to him for principal and interest, to all such interest as *Hampson* had in the security aluded to in the letter of the 15th of July 1823. Refer it to the Master to enquire what interest *Hampson* had in the mortgage at the date of the agreement of the 15th of July 1823, whether he continued to be entitled to the same interest up to and at the time of his decease, and what other interest he had at the time of his death.

Reserve further directions and costs.

Reg. Lib. A. 1829. p. 2129. (a)

(a) This decree is to be found in the index to the decrees *only*, under the title of *Eaton v. Scott*,

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July 26.

NEWBOLD v. ROADKNIGHT.

*Legacy.**Ademption.*

Devise of land upon trust, to sell the same, and out of the product to pay 3000*l.* to *A.*

The testator sold the estate in his lifetime:

Held, that the legacy was adeemed.

IN this case *William Norris* deceased, by his will which had been duly executed for passing real estates, after reciting that he had contracted for the purchase of an estate situate at *Marton* in the county of *Warwick*, but that he had not paid the whole of the purchase-money for the same, and that the estate had not been conveyed to him, devised all his right, title, and interest therein to *William Roadknight* and *Robert Welchman*, their heirs and assigns, upon trust to sell the same, and out of the monies to arise from the sale thereof to pay the costs, charges, and expenses of the sale, and such part of the purchase-money as might then remain unpaid, and all interest that might be due thereon; and to stand possessed of the surplus upon the trusts thereafter declared concerning his personal estate, of which he directed that it should form and be considered a part; and after disposing of various other parts of his property, expressed himself in the following words: — “ I give and devise all my messuages, closes, lands, tenements, and hereditaments, situate, lying, and being in *Eathorpe* in the county of *Warwick*, unto the said *William Roadknight* and *Robert Welchman*, their heirs and assigns, upon trust, as soon as conveniently may be after my decease, absolutely to sell and dispose of the same either by public auction or private contract, and either together or in parcels, for the most money and best price or prices that can or may be reasonably obtained for the same; and, after defraying thereout the costs, charges, and expenses incident to and attending such sale or sales, and in making out good and perfect titles to the purchaser or purchasers, upon trust

to pay unto Mr. *Thomas Newbold* of *Baggington*, the husband of my daughter *Elizabeth Newbold*, the sum of 3000*l.*, which I hereby give and bequeath to him accordingly, to and for his own use and benefit; and then upon trust to pay and divide the surplus of the said last-mentioned purchase-money unto and amongst all and every the child and children of my late son *Thomas Norris*, and the child and children of my said daughter *Elizabeth Newbold*, equally to be divided between them when and as they shall respectively attain the ages of twenty-one years, with benefit of survivorship and accruer amongst them;” and, after bequeathing certain legacies, gave the residue of his personal estate to his said trustees absolutely, upon trust to convert the same into money, and to stand possessed thereof and of the surplus of the money to be produced from the sale of the said estate at *Marton* aforesaid, upon trust to pay his just debts and funeral and testamentary expenses, and to pay and divide the residue thereof unto and amongst the children of his said late son *Thomas Norris*, and the children of his said daughter *Elizabeth Newbold*, equally to be divided between them when they should respectively attain their ages of twenty-one years, with such benefit of survivorship and accruer as therein is mentioned; and thereby appointed the said *William Roadknight* and *Robert Welchman* executors of his said will.

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D.
ROADKNIGHT.

The testator, after the execution of his will, sold the said estate at *Eathorpe*, and conveyed the same to the purchaser thereof, and received from him the purchase-money for the same; and subsequently to the completion of such sale, made a codicil to his said will, which was also executed for passing real estates, whereby, after reciting that since he had executed his will the said estate at *Marton* had been conveyed to him, he devised

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v.

ROADENIGHT.

that estate to his said trustees in fee, and declared that they should stand seised thereof upon such trusts as were expressed concerning the same in and by his said will; and, after bequeathing one pecuniary legacy to his servant, concluded his said codicil with these words: — “And I do in all other respects ratify and confirm my said last will and testament.”

The testator, at his death, left his two trustees and executors, and his daughter *Elizabeth*, who was the wife of the said *Thomas Newbold* in the will named, and eight infant children of his said daughter *Elizabeth*, and six infant children of his deceased son *Thomas Norris* him surviving.

The bill was filed by the said *Thomas Newbold* and his wife against the trustees and executors, claiming the legacy of 3000*l.* bequeathed to him by the will, making all such infant children also parties Defendants.

Mr. *Pemberton* and Mr. *Wakefield*, for the Plaintiffs, argued that the testator intended *Thomas Newbold* to have the legacy of 3000*l.* at all events, and that the same was a general pecuniary legacy charged upon real estate, and that such intention was apparent from his use of the words “which I hereby give and bequeath to him accordingly” contained in the will; and that the subsequent sale of the estate at *Eathorpe* was only an act which the testator had directed his trustees to do; and that his performing the same in his lifetime ought not to be considered to invalidate his own gift of the 3000*l.*; and that a legacy charged upon real estate did not fail merely from the circumstance of the testator *not being entitled to such estate at the time of his death*, and cited the case of *Fowler v. Willoughby* (a) as an

(a) 2 Sim. & Stu. 354.

authority to that effect; and argued that, even if the Court should be of opinion that the legacy was adeemed by the sale of the *Eathorpe* estate, that the gift of the 3000*l.* was re-established by the confirmatory words of the codicil.

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ROADKNIGHT.

Mr. *Tinney* and Mr. *Jeremy* for the Defendants, insisted, from the words of the will, that the legacy of 3000*l.* was not a general pecuniary legacy, but was given out of the produce of the *Eathorpe* estate only; and that, as, according to the case of *Page v. Leapingwell* (a), a legacy charged upon real estate is a specific bequest, the gift of the 3000*l.* must have failed upon the sale of the *Eathorpe* estate; and, further, that, as such sale was a revocation of the devise of the realty, the legacy must have been thereby adeemed, and cited as an analogous case *Arnald v. Arnald*. (b) They submitted, that the case of *Fowler v. Willoughby* was distinguishable from the present by the circumstance that the gift there was merely pecuniary with a particular security, and that the security failed by accident, whilst, in this instance, the gift of the legacy was not independent of the realty; and that the revocation was the result of an act indicative of intention on the part of the testator himself; and, to shew that the words "which I hereby give and bequeath to him accordingly," did not render the legacy so independent, referred to the practice of conveyancers in using such words, and to the case of *Hancox v. Abbey*. (c) And as to the confirmation of the gift by the codicil, they contended, that since the effect of republishing a will was to make it operate at the time of the republication, the codicil, in this instance, could not re-establish the gift, because it was not merely pecuniary, and the estate upon which it had been charged had

(a) 18 *Ves.* 463 a.

(b) 1 *Bro. C. C.* 401.

(c) 11 *Ves.* 179.

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 v.
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then been sold; and that where a codicil sets up a particular gift, confirming the will in all other respects, it does not revive a devise revoked, as appeared from several cases, of which they cited only *Irod v. Hurst* (a), and *Crosbie v. M'Doual*. (b)

The counsel for the infant children of the Plaintiffs, upon the last point cited also the case of *Monck v. Lord Monck*. (c)

Mr. *Harwood* appeared for the trustees and executors.

Mr. *Pemberton* in reply, maintained that the gift was to be considered as a pecuniary legacy not adeemed by the act of the testator, and that the same ought to be paid out of his personal estate; that the cases cited for the Defendants were not in point, and that *Fowler v. Willoughby* was the ruling authority on the subject; but lest the Court should think that the legacy for any reason failed, insisted that the bequest thereof was restored by the codicil.

The MASTER of the ROLLS having postponed his judgment to this day (2d of *August*), after stating the case, declared it to be his opinion, that the legacy was not a general bequest, but a legacy out of the estate at *Eathorpe*; and that, upon the cases, it was adeemed by the sale of that estate; that the case of *Fowler v. Willoughby*, in which the question was, whether on a charge of a legacy on real estate as a further security, if such security should fail, the fact of its having been so charged would render the gift altogether ineffective, was very distinct in its nature from the present; and, after adverting to the fact of the testator having in the

(a) 2 *Freem.* 224.

(b) 4 *Ves.* 610.

(c) 1 *Balk. & B.* 306.

codicil mentioned the completion of his purchase of the estate at *Marion*, and not having alluded to that at *Eathorpe*, declared that, upon the intention to be derived from the acts of the testator, and upon the authorities, he was of opinion that the Plaintiff, *Thomas Newbold*, was not entitled to be paid the legacy of 3000*l.* out of any part of the assets of the said *William Norris*.

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Decree, that the Plaintiff, *Thomas Newbold*, is not entitled to the legacy of 3000*l.* in the pleadings mentioned.

Reg. Lib. B. 1829. p.2463.

HUMPHREYS v. HOWES and Others.

ROLLS.
July 12.

JOHN HUMPHREYS, by his will, bequeathed the residue of his personal estate unto trustees, upon trust to invest the same, and pay the dividends and interest to two of his brothers and his sister during their lives, and the life of the survivor of them, during his or her natural life, and after their deaths to transfer the principal to his two nephews, *John Humphreys* and *John Crow*, and if either of them should die before his share of the trust monies became payable, without leaving issue of his body lawfully begotten, then his share should go to the survivor when his original share would become payable; and if both those nephews should die without leaving issue before their shares became

Will.
Survivorship.

Bequest of residue upon trust, to pay the dividends to three persons during their lives and the life of the survivor of them; and after their deaths to transfer the principal to *A.* and *B.*, and if either of them died before his

share of the trust money became payable without leaving issue of his body lawfully begotten, then his share should go to the survivor when his original share would become payable. *A.* died in the lifetime of the testator, *B.* survived the testator and the persons to whom life interests were given: Held. that *B.* was entitled to one moiety as his original share, and to the other moiety as having survived *A.*, who died without leaving issue of his body.

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 HUMPHREYS
 v.
 HOWE.

payable, then upon trust for the children of his four brothers and of his sister, when they should respectively attain twenty-one. The residue amounted to about 12,000*l.* in different stocks.

The two brothers first mentioned died in the lifetime of the testator, and *John Crow* also died in the lifetime of the testator, without leaving issue. The testator's sister, and the other nephew, the Plaintiff *John Humphreys*, survived the testator. The testator's sister died in July 1829.

Mr. *Tinney*, Mr. *Spence*, and Mr. *Lloyd*, for the Plaintiffs, contended that the bequest over to the surviving nephew took effect; and cited *Humberstone v. Stanton* (a), *Walker v. Main* (b), and *Willing v. Baine*. (c)

Mr. *Pemberton* and Mr. *Bethel*, for the next of kin, argued that this case was to be distinguished by the circumstance of life-interests being first given to other persons, and that the testator, in the limitation over to the survivor of the two nephews, in the event of either of them dying before his share became payable, only contemplated the death of one of them after his own death and during the life of the other tenant for life. They cited *Corbyn v. French* (d), *Bone v. Cook* (e), *Cripps v. Woolcot* (g), *Miller v. Warren* (h), and *Rider v. Wager*. (i)

Mr. *Pattison* for the trustees.

The MASTER of the ROLLS. The question is, whether, in the event that has happened, the interest in-

(a) 1 *V. & B.* 385.

(c) 3 *P. W.* 113.

(e) *M'Clellan*, 168.

(h) 2 *Vern.* 207.

(b) 1 *Jac. & Walk.* 1.

(d) 4 *Ves.* 418.

(g) 4 *Mad.* 11.

(i) 2 *P. W.* 328.

tended for the deceased nephew survived to the other? Upon reference to the cases, I find that the leading case upon the subject is *Willing v. Bain* (a); there the testator gave 200*l.* a piece to his children, payable at their respective ages of twenty-one, and if any of them died before the age of twenty-one, then he directed that the legacy given to the person so dying should go to the surviving children. One of them died in the lifetime of the testator, and before twenty-one; and it was held that the surviving children took the whole. That authority was referred to by Sir *W. Grant* in *Humberstone* and *Stanton*, and he there states, that in the case of *Willing v. Baine*, "it was held, and is now settled, that the bequest over takes place." In the argument of the present case of *Humphreys* and *Howes*, it is stated, there is this distinction, that in *Willing v. Baine* and *Humberston v. Stanton* there was no previous interest for life; and some cases have been referred to as authority for that distinction, but it does not appear to me that the principle upon which those cases were decided has any application to the present case. The very point in question here has been, in truth, decided in the case of *Walker v. Maine*, which has been referred to in the argument.

1830.

HUMPHREYS
v.
HOWES.

Decree, that upon the death of the testator's sister, the Plaintiff *John Humphreys* became entitled to one moiety of the residue as his original share, and to the other moiety as having survived *John Crow*, who died, without leaving issue of his body lawfully begotten, in the lifetime of the testator.

Reg. Lib. A. 1829. fol. 2098.

(a) 3 P. W. 113.

1830.

BETWEEN

ROLLS.

March 9.

CHARLES LANCELOT HOGGART, THOMAS
ABBOT, and T. C. SMITH, - - Plaintiffs;

AND

JOHN SCOTT, - - Defendant.

*Vendor and
Purchaser.*

Houses and lands were devised to trustees in fee, upon trust for sale. The surviving trustee appointed the Plaintiffs his executors, but did not make any devise which comprehended trust estates. On the death of the surviving trustee, his executors sold

THE Plaintiffs *Abbot* and *Smith*, by the other Plaintiff *Hoggart* an auctioneer, sold four lots of houses to the Defendant. An abstract of title was delivered to the solicitors for the purchaser, and they prepared the draft of a conveyance, and sent it to the solicitor of the vendors for his perusal, and he having approved and returned it, the purchaser's solicitors had it engrossed. It was soon afterwards discovered by the purchaser of another lot that the legal estate was not in the vendors, but in the infant heir at law of one *Robert Abbot*, the survivor of two trustees to whom this property had been devised by the will of *Thomas Bush* upon trust for sale. *Robert Abbot* had made a will, by which he appointed the vendors his executors, but it did not contain

the property in lots. The Defendant became the purchaser of four of them, and just as his purchase was about to be completed, it was discovered that the legal estate was in an infant; the heir at law of the surviving trustee. The Plaintiffs thereupon presented a petition to the Court under the statute 6 G. 4., that the infant might be directed to convey. The Plaintiffs apprised the Defendant of this proceeding, to which he made no objection. Twelve months elapsed before the Master's report could be obtained, and a short time previously the Defendant commenced his action for the deposit, and subsequently recovered it; in the meantime the dilapidations of the houses purchased had increased.

Held, that although the Defendant might have retired from the contract on the discovery of the defect in the vendor's title, yet as he did not do so, and acquiesced in the proceedings which were necessary to clothe the Plaintiffs with the legal title, and there being no evidence that reasonable diligence was not used in the Master's office, the Plaintiffs were entitled to a decree for specific performance:

Held, that the Defendant was entitled to the amount of the dilapidations:

Held, that the Defendant was entitled to costs:

Held, that the Plaintiffs were only entitled to interest from the date of the decree, but that they were entitled to the rents up to that date.

any devise that would pass this trust estate, which therefore descended to his infant grandson.

1830.

HOGGART

v.

SCOTT.

This discovery was made in *March* 1826, and a petition was presented to the Court of Chancery, praying that the infant might be directed to convey under the statute 6 G. 4.; on the 23d *June* 1826, the Court made the usual reference to the Master, but from difficulties experienced in procuring certificates of registry of births, &c. and other circumstances, the report was not completed until the 26th *May* 1827. The Defendant was apprized that these proceedings were going on. In *September* 1826 the Defendant's solicitors, by letter, called upon the vendor's solicitor to complete the title or return the deposit, and they also sent letters to the same effect in *January* 1827, and two or three times afterwards. The vendor's solicitor in *February* and *March* wrote letters to the solicitors for the purchaser, reporting the progress of the proceedings; and in *May* 1827, the vendor's solicitor wrote the Defendant's solicitors, that he every day expected to receive the Master's report, when he would immediately proceed to complete the title, that he had experienced much difficulty in making the same perfect, and that no time had been lost.

A few days afterwards the Defendant commenced his action against the Plaintiff *Hoggart* for his deposit.

The Master's report was confirmed in *June*, and thereupon the vendor's solicitor sent the solicitors for the Defendant an abstract of the report, to which they sent no answer, but they proceeded with the action, and at the trial on the 14th *July* 1827, the jury found a verdict for the Plaintiff.

1830.
 HOGGART
 v.
 SCOTT.

There was evidence on the part of Defendant of dilapidations; a surveyor deposed that, in *January 1826*, there were general dilapidations to the extent of 155*l.*, but that the property was then in tenantable repair; that he again surveyed the property in *June 1828*, when the premises had become greatly dilapidated, and the principal part thereof so run to waste, as to render it impossible to repair the same. The tenants had, for the most part, quitted the houses.

Mr. *Bickersteth* and Mr. *Lynch*, for the Plaintiffs, cited *Hudson v. Bartram* (a), *Wynn v. Morgan* (b), *Seton v. Slade* (c), and argued that the Defendant having consented to the petition to the Court, and concurred in the other proceedings, he had waived any right he might have had to get rid of the contract.

Mr. *Pemberton* and Mr. *Phillimore* for Defendants.

It now turns out that the Plaintiffs were not trustees for sale; they had neither a legal right nor a beneficial interest; they had no authority for the purpose of selling; they had no right to sell; the trustees died, and the survivor devised his estates to the present Plaintiffs; it turns out that the trust estates did not pass by that devise. How is it possible that they can enforce a sale? they have entered into a contract which they not only cannot perform, but which they had no right to enter into. Here, the legal estate that has been obtained is not an addition to their interest, but long after the institution of this suit the Plaintiffs clothe themselves with a character which they had not at the time of the sale; there are many cases on the point. These Plaintiffs not being trustees at the

(a) 5 *Mad.* 440.

(b) 7 *Ves.* 202.

(c) 7 *Ves.* 264.

time they entered into the contract, have no right to bind the Defendant.

1830.
HOGGART
v.
SCOTT.

The contract has been rescinded at law, and, since the purchase, the property has sustained considerable dilapidations; they cited *Boehm v. Wood* (a), *Hudson v. Bartram* (b), and *Lloyd v. Collett*. (c)

The MASTER of the ROLLS.

The objections urged are:—

1st. That the vendors have no power to sell.

2d. That there has been unreasonable delay.

3d. That the premises are dilapidated.

The testator devised to trustees with a power of sale, and the present Plaintiffs, *Abbot and Smith*, are the personal representatives of the surviving trustee: by a misapprehension the Plaintiffs thought themselves clothed with the power of sale. An abstract was delivered in pursuance of the contract; some time afterwards it was discovered, not by this Defendant but by the purchaser of another lot, that the Plaintiffs had not the power of sale, and that the legal estate had descended to an infant trustee. The vendors presented a petition under the 6 G. 4., a communication was made to the purchaser that such a petition was presented, he made no objection to that proceeding, and he therefore must be held to have acquiesced in it, provided it was prosecuted with reasonable diligence. Considerable time was occupied in making out the pedigree, and the Master made his report twelve months afterwards.

(a) 1 *Jac. & Walk.* 419.

(b) 3 *Mad.* 440.

(c) 4 *Brown*, 469.

1830.

HOGGART
v.
SCOTT.

The Plaintiffs were not mere strangers, — they have assumed the execution of the trusts, but without sufficient legal authority.

Those vendors having acquired the legal authority before the hearing of this suit, there is no objection to a decree for specific performance, — the Defendant might have retired from the contract on the discovery of the defect in the vendors' title; but he did not do so, he acquiesced in those proceedings which were necessary to clothe the Plaintiffs with the legal title, and there is no evidence that reasonable diligence was not used in the Master's office.

I am of opinion, therefore, that on the ground of delay there is no objection.

With respect to the dilapidations, the Defendant has a right to an enquiry what the dilapidations are. I am of opinion that the Plaintiffs are entitled to a decree for a specific performance, and that the Defendant is entitled to an enquiry respecting dilapidations, reserving further directions therein.

The Defendant is entitled to the costs of the suit, a good title not having been made at the time of the commencement of the suit.

Decreed, that the Plaintiffs are entitled to a specific performance of the agreement. The Master to enquire what dilapidations the premises have sustained since the contract for sale. The Master to tax the Defendant's costs, which, when taxed, are to be paid by the Plaintiffs to the Defendant.

Reg. Lib. 1829. A. p. 1541.

The Defendant waived all objections to the title. The Master estimated the dilapidations at 175*l.* 10*s.* His report was confirmed. This cause came on for further directions on the 3d *December* 1830, when the question of interest was discussed; and his Honor held, that the defect in title could not properly be called an unforeseen occurrence, and that the Defendant had a right to assume that the vendors could make a good title, that it was the fault of the vendors that the premises stood empty; and it was decreed that the Defendant should pay unto the Plaintiffs *Abbott and Smith* interest on the sum of 1280*l.*, the purchase-money, from the 9th *March* 1830 (the time of the decree,) and that the rents up to the 9th *March* 1830 should be paid to the Plaintiffs. The Master to tax Defendant's costs of enquiry as to dilapidations, and his subsequent costs, and the Plaintiffs to pay the same to the Defendant.

Reg. Lib. 1830. A. p. 466.

1830.
 HOGGART
 v.
 SCOTT.

PEAKE v. GIBBON.

ROLLS.
 1851.
 February 18.

THIS was a suit by a person beneficially interested in a sum of money secured by a mortgage against the person to whom, as a trustee, the mortgage was made, and the heir at law of the mortgagor, for an assignment of the mortgage by the trustee, and for foreclosure.

*Insolvent
 Trustee.
 Costs.*

—
 The provisional assignee is entitled to his costs from the mortgagee, in

a suit for foreclosure by the mortgagee, who will be allowed to add them to the principal and interest due to him on the mortgage.

1831.

PEAKE
v.
GIBSON.

The heir having taken the benefit of the act for the relief of insolvent debtors, a supplemental bill was filed against the provisional assignee.

An argument was raised, whether the provisional assignee should be allowed his costs; and the Master of the Rolls said, it would be very hard if he were not allowed them, he being a public officer. His Honor made the usual decree for foreclosure, and ordered that the Plaintiff should pay the costs of the provisional assignee, and add them to his debt.

Mr. *Pemberton* and Mr. *Wakefield* for the Plaintiff

Mr. *Hind* for the trustee.

Mr. *Teed* for the provisional assignee.

1830.

February 23.

THOMAS ALCOCK v. RICHARD TAYLOR.

Partnership.

The Plaintiff and Defendant held some powder-mills on a lease, which would expire in 1831. The Plaintiff filed his bill for a dissolution of the partnership; it was objected by the Defendant that the partnership must last during the lease, but the Court held the partnership dissolved from the time stated in a notice given by the Plaintiff to the Defendant.

THE bill set forth a lease from the Duke of *Northumberland* to *Hencage Legg* and the Defendant of certain powder-mills and lands on *Hounslow Heath*, from the 29th of *September* 1810, for the term of twenty-one years, at the yearly rent of 450*l.* and 100 weight of gunpowder.

This lease was granted for the benefit of the lessees themselves, and Mr. *Joseph Alcock* and a Mr. *Crawford*;

each having a certain number of seventy-two shares, into which the trade or business of making and vending gunpowder carried on at the mills had been divided.

1830.
ALCOCK
v.
TAYLOR.

In the year 1820 *Joseph Alcock* became entitled to thirty-five sixtieth parts of the residue of the term, and Defendant *Richard Taylor* became entitled to the remaining twenty-five sixtieth parts; and they carried on the business up to the time of the death of *Joseph Alcock*, on the 2d of *August* 1821.

Joseph Alcock by his will gave all his property to his son of the same name, and he and the Defendant continued to carry on the business. On the 20th of *December* 1822 *Joseph Alcock* the younger also died, having by his will given all his property to his brother, the Plaintiff; and the Plaintiff and Defendant continued to carry on the business.

On the 13th of *July* 1827 the Plaintiff gave the Defendant notice in writing of his desire to settle the accounts of the partnership, and that the partnership should be dissolved.

The bill prayed that the accounts might be taken, the partnership dissolved, the property sold, and the receiver appointed.

The Defendant, by his answer, stated that there was an understanding between him and the Plaintiff that the business should be carried on during the continuance of the lease, unless an opportunity of selling advantageously to the satisfaction of both parties should occur; and the Defendant insisted that that understanding was recognized in the following letter, relative to a proposal made

1830.

ALCOCK
v.
TAYLOR.

by the Plaintiff to the Defendant to employ a son of the Defendant in the business:—

“*Kingswood.*

“My dear Sir,—I am afraid you misunderstood my object in alluding to your son’s going to the gunpowder office; for I can most truly assure you that I have only one end in view, which was intended for your benefit and your son’s, for if to-morrow you wrote me word that you wished to wind up the concern, I should be most happy, and certainly I never yet have looked forward to any ultimate advantage in the trade, but have only endeavoured as much as possible to make the best of a bad thing, since it was impossible to get rid of it. I therefore looked forward to 1831 to wind up; although at the same time one cannot tell for certain that one may remain of the same opinion. I am, &c.

“THOMAS ALCOCK.

“*R. Taylor, Esq., Hounslow Heath.*”

And the Defendant insisted that the business should be carried on during the continuance of the lease.

Mr. *Bickersteth* and Mr. *M’Arthur* for the Plaintiff. Lord *Eldon*’s judgment in *Crawshay v. Maule* (a) applies to this case: that learned Judge said that “where no term is expressly limited for the duration of a partnership, and there is nothing in the contract to fix it, the partnership may be terminated at a moment’s notice by either party.”

Mr. *Tinney* and Mr. *Barber*, for the Defendant, contended that there was evidence in the case that the partnership should continue until 1831.

(a) 1 *Swanst.* 508.

The MASTER of the ROLLS did not consider there was any such agreement, and declared the partnership dissolved from the time stated in the notice.

1830.

ALCOCK

v.

TAYLOR.

Accounts to be taken.

Further directions and costs reserved

BESANT v. RICHARDS.

ROLLS.

March 30.

THIS was a suit by a purchaser against a vendor for specific performance of a contract for the sale of an inn, and for compensation. The contract was entered into on the 30th of March 1827, for the sale of the inn, and the other hereditaments held by *Matthew Watson*, for 1300*l.*; and it was thereby agreed that the title should be made good by the vendor, and the expense of the conveyance borne by the purchaser, and that the sale should be completed at *Michaelmas* then next.

*Vendor and
Purchaser.*

The Defendant contracted to sell an inn to the Plaintiff, and in the treaty represented to him that the agreement under which the tenant in possession held it was a void agreement and that he would give the Plaintiff possession at *Michaelmas* following. He had in fact given the tenant notice to quit at that

There was no other stipulation in the agreement. In the previous treaty, the Defendant represented to the Plaintiff that the agreement under which *Watson* held the inn was a void agreement, and good for nothing; that he had served *Watson* with a notice to quit at *Michaelmas* following, and that he would give the Plaintiff possession at that time.

time; the tenant did not quit. These representations were proved by witnesses: Held, that the Plaintiff was entitled to be released from the agreement, or that he might at his election perform it and have compensation. He elected to have performance, and it was decreed to him, with compensation and costs.

1890.

BESANT
v.
RICHARDS.

Watson died before the time arrived, and his widow, who was his personal representative, refused to quit, insisting upon the validity of the agreement.

The agreement was for a ten years' term. The Defendant had, in fact, given *Watson* the notice to quit; and several witnesses proved admissions by the Defendant that he had made the representation stated.

Mr. *Pemberton* and Mr. *Richards* for the Plaintiff.

The Defendant represented to the Plaintiff that he could give him possession in *September*; and upon the faith of then having possession, which was his great object, the Plaintiff entered into the contract. The case of *Dobell v. Stevens* (a) is in point; that was an action by the purchaser of a public-house against the vendor, who had made deceitful representations respecting the amount of business done in the public-house, and the rent received for the tap: it was held, that the purchaser might maintain an action on the case for the deceitful representations, although they were not noticed in the contract or in the conveyance. Several of the witnesses examined on the part of the Plaintiff have sworn to the representations made to him by the Defendant, and the mere fact of the Defendant having given his tenant notice to quit, shews plainly that he was to put the Plaintiff in possession in *September*. It must be intended from this fact, that the Defendant contracted to give the Plaintiff possession.

Mr. *Bickersteth* and Mr. *Girdlestone*, jun., for the Defendant, argued that, as the tenancy of *Watson* appeared upon the contract, it was the Plaintiff's own

(a) 5 B. & C. 623. 5 Dowl. & Ry. 490.

fault if he did not enquire into the effect of the agreement with him; and contended that the delivery of possession was not an essential part of the contract.

1830.
BESANT
v.
RICHARDS.

The MASTER of the ROLLS. On the 30th March 1827, the Plaintiff enters into an agreement with the Defendant for the purchase of the *Bull Inn*, then in the possession of *Matthew Watson*; but the Plaintiff's case is, that he entered into the agreement with the representation that a prior agreement entered into with *Watson* was a void agreement. I cannot conceive evidence more clear to prove the fact of that representation; and the concurring testimony of all the witnesses makes it evident that the Defendant had made an admission of his having made it. The Defendant does not deny the representation, — that he did represent that it was a void agreement. The Defendant adds in his answer, that he said to the Plaintiff, “You had better consult your own solicitor;” but there is nothing in the shape of evidence to prove this allegation in the answer. The effect of the representation is decided by the case of *Dobell v. Stevens*, which has been cited. I am of opinion that the Plaintiff ought not to be bound by the agreement, purchasing, as he did, on the faith of that representation. He is entitled to be released from the agreement altogether; or, if he chooses, he may perform it, and have compensation. The Plaintiff has his election.

Mr. Pemberton elected to take performance with compensation.

The MASTER of the ROLLS. I think you are entitled to take which you please.

1830.

BESANT
v.

RICHARDS.

Decreed, that the Plaintiff was entitled to compensation, and that the contract be carried into effect, and that the Master ascertain what compensation the Plaintiff is entitled to in respect of the agreement between Defendant and *Watson* from the 29th of *September* 1827 to the expiration of the term of ten years, thereby agreed to be granted, and the amount, when ascertained, with the Plaintiff's costs, to be deducted from the purchase-money.

Reg. Lib. 1829. A. p. 942.

ROLLS.

February 22.

WYNNIAT v. LINDO.

*Vendor and
Purchaser.
Parties.*

A party having purchased land, and signified at the time, that he made the purchase on behalf of the trustee in his marriage-settlement, who had money vested in him to be laid out in land, and a bill being filed against him for specific performance, the Court would not allow the cause to proceed until the trustee were made a party; and the cause stood over for that purpose.

THIS was a bill for specific performance by a vendor against the Defendant, who, in treating for the purchase, disclosed to the vendor that he made the purchase for another person, who was a trustee in the marriage settlement of the Defendant, and who had money vested in him for the purchase of land for the purposes of the trusts of that settlement.

Mr. Preston and Mr. Barber for the Plaintiffs.

The MASTER of the ROLLS.

This bill is filed against the Defendant personally, to compel him to complete his contract after the disclosure he made that he was merely treating on the part of his trustee. I am of opinion it is unreasonable: that it is not consistent with the practice of the Court,

and that there is no precedent for it. This cause must stand over to make Mr. *Lucas*, the trustee, a party.

1850.

WYNNIAT

v.

LINDO.

BULL v. JOHNS.

WESTMINSTER
HALL.

June 25.

MISS POLLY BULL of *Cheltenham*, made her will bearing date the 29th day of *December* 1823, and by a codicil bequeathed half her furniture, glass, china, &c. to her niece *Mary M'Cormick Johns*, and also all her clothes and her musical clock. And after giving some pecuniary legacies, the codicil thus proceeded: — "And all the rest of my goods, money, and effects wheresoever and whatsoever (excepting 1000*l.* to *Henrietta Bull*, daughter of my brother *James*.) I give and bequeath to *William Lake Esq.*, *John Carne sen.*, and *William Carne*, in trust for my eldest brother, *John Bull's* children, and *Mary M'Cormick Johns's* children, to be equally divided between them for their separate use; the dividends to be laid out by the said trustees as shall be most advantageous for them, not one farthing of which is to go for their board or education, but to accumulate for them until they come to the age of twenty-one years."

Will.

Bequest of residue to trustees upon trust for testatrix's brother's children and *M's* children, to be equally divided between them; the dividends to be laid out by the trustees as should be most advantageous for them; but no part of the dividends to go for their board or education, but the same to accumulate for them until they come to the age of twenty-one years.

Mary M'Cormick was a daughter of *John Bull* by a former wife, and she became of age on the 15th of *April* 1825. At the death of the testatrix she had two children, and she had two others after the death of the testatrix.

M. was herself one of the children of the testatrix's brother:

Held, that the children born at the death of the testatrix took vested interests: Held, that the testatrix did not mean to include *M.* as one of the children of his brother.

1830.

BULL
v.
JOHNS.

At the death of the testatrix *John Bull* had three children besides *Mary M'Cormick Johns*, and he had another after the death of the testatrix.

Mr. Bickersteth for the Plaintiff, the administrator.

Mr. Tinney for *Mrs. M'Cormick Johns*. She is herself entitled to a share as one of the children of *John Bull*. This is a gift immediately upon the testator's death, and there is nothing in the will to prevent the vesting. *Scott v. Harwood* (a), *Davidson v. Dallas*. (b) The children who were born at the testatrix's death are those who take. I believe it is admitted on all sides that after one child has attained twenty-one, no child born afterwards can take. Now *Mrs. M'Cormick Johns* attained twenty-one in the lifetime of the testatrix.

Mr. Wright appeared for the other children of *John Bull*, who were born at the death of the testatrix.

Mr. Tennant for the two children of *Mrs. M'Cormick Johns* who were born at the death of the testatrix.

Mr. Garrett and *Mr. Thompson* for the children born after the death of the testatrix.

Mrs. M'Cormick Johns herself takes nothing. The testatrix plainly intended a provision for those under twenty-one or unmarried, whilst *Mrs. M'Cormick Johns* was a married woman at the time of the testatrix's death, and required neither board nor education. Then it is plain that this is not to be divided until the children attain twenty-one; and when there is that suspense, the

(a) 5 Madd 352.

(b) 14 Ves. 576.

Court takes advantage of it for the benefit of children born after the death of the testatrix. *Pulsford v. Hunter* (a), *Leake v. Robinson* (b), *Gilbert v. Boorman* (c), and *Curtis v. Curtis*. (d) Mrs. *M'Cormick Johns* has a legacy, which is a circumstance indicating that she was to be excluded from the residuary bequest.

1830.

BULL
v.
JOHNS.

The MASTER of the ROLLS. It is quite plain that the testatrix did not mean to include Mrs. *M'Cormick Johns*, — she spoke of children who required board and education. The children born at the death of the testatrix take vested interests. There is no expression in the will that can satisfy a Court that the period of division was to be postponed until the children attained twenty-one; but the testatrix meant that the fortune should accumulate. I am of opinion that the children of *John Bull*, born at the death of the testatrix, except Mrs. *M'Cormick Johns*, take vested interests. The children of Mrs. *M'Cormick Johns*, born at the death, also take; and they take vested interests. Costs to all parties out of the fund.

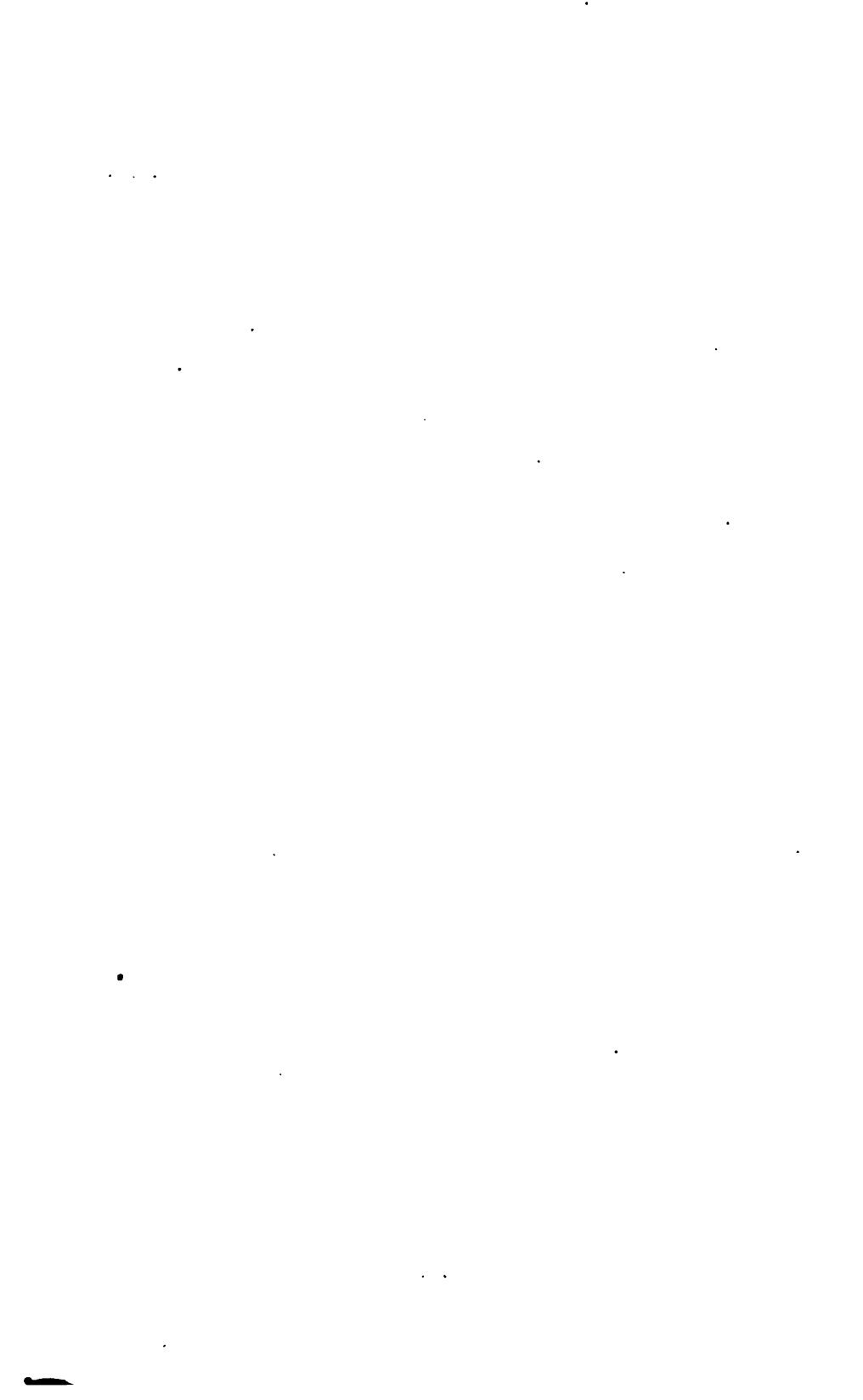
Reg. Lib. 1829. A. 1897.

(a) 3 *Brown*, C. C. 416.

(b) 2 *Mer.* 383.

(c) 11 *Ves.* 258.

(d) 6 *Mad.* 14.



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TO THE

PRINCIPAL MATTERS.

A.

ACCOUNTS.

1. The Defendant engaged the Plaintiff as second mate of a vessel in the *South Sea Whale Fishery*, and the Plaintiff was to have a forty-fifth share of the net produce. On the return of the ship the Defendant settled with the Plaintiff on the ground that he was entitled to a forty-fifth share: Held, that that was conclusive as to the share the Plaintiff was entitled to. No account having been produced, and the Plaintiff having afterwards discovered that several deductions had been made that were not authorized by the custom of the trade, the Court directed enquiries whether the deductions made were authorized by the custom of the trade. *Spittal v. Smith.* Page 45
2. The master of a vessel in the *South Sea Whale Fishery*, on behalf of his owners, agrees with the officers and crew, that each shall have a specified part of the net produce of the voyage. Shortly before the return of the vessel, the owners, who were entitled to a part of the net produce, sell a quarter of the cargo at 52*l.* per tun on their own account. The

practice of the trade is, on the arrival of a vessel, to have the cargo estimated by a ship's cooper, and the price fixed at that given in the market on the arrival of the cargo. That mode was adopted in this case, and the Plaintiff being apprised of it, settled accordingly: Held, that the owners had no right to sell a part of the cargo on their own account, they being only entitled to a share of the produce; but the Plaintiff, having settled, was too late for relief in equity: Held also, that having settled upon the estimated quantity, although the cargo ultimately proved to amount to six additional tuns, yet, the Plaintiff having acted upon the estimate, he was not entitled to relief in equity. *Cockle v. Whiting.* Page 55

3. By the act 59 G.3. c. 111. navy agents are entitled to make the usual charge for passing accounts respecting transactions before that act, and are also entitled to charge commission on the full amount of pay, without being limited by the money actually passing through their hands. *Drury v. Atkins.* 75
4. Defendants having received 450*l.* as 2½ per cent. returned premium on 18,000*l.* in 1814, without bringing it to account for many years,

alleging that it awaited the final adjustment of average; the Court referred it to the Master to enquire whether they were entitled to retain it according to the usage and custom of merchants. *Drury v. Atkins.* Page 75

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1. Testator having declared that the dividends should accumulate during the life of his daughters, and until their children respectively should attain twenty-five, when the principal should be transferred to the children, the Court directed the dividends to accumulate for twenty-one years, if the children should so long live; but the Court would not decide on the question of remoteness, as, if the daughters left no issue, the question would not arise, and the Court will not decide an hypothetical case. *Banks v. Sladen.* 407
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ACTS OF PARLIAMENT.

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Devise of land upon trust to sell the same, and out of the produce to pay 3000*l.* to A. The testator sold the estate in his lifetime: Held, that the legacy was

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COUNSEL.

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ANNUITY.

1. A testator directed that an annuity of 250*l.* should be purchased for his wife, within three months after his decease. She survived him seven months, but the annuity had not been purchased at the time of her death. Her personal representatives filed their bill for payment of the value of the annuity at the time at which the testator had directed it to be purchased, and the Court decreed accordingly. *Dawson v. Hearn.* 465
2. But if an annuitant has for some time received the annual sum, the Court will direct an enquiry whether the annuitant elected to take the annuity from the person who was directed to purchase it, instead of the principal sum. *Brown v. Ross.* 469
3. It makes no difference whether a certain sum be given to purchase an annuity, or a certain annuity is directed to be purchased; the Court considers the annuity a legacy to the amount of its value. 469

4. But the annuitant may waive it, and receive the annual sum from the executors. *Page 469*
5. The annuitant does not waive his right to have the annuity purchased, by consenting to receive the annuity until the purchase should be made. *469*
See USURY.

ANSWER.
See BANKRUPT.

ANTICIPATION OF RENTS.
See INSOLVENT DEBTORS, 3.

APPOINTMENT.
See POWER.

ARRANGEMENT.
See WILL.

ASSETS.

1. It is a general rule that personal estate is first liable to the payment of mortgages in exoneration of the real estate mortgaged. *136. 142 n.*
2. And next, the real estate descended is liable, unless the debts be directed to be paid out of the land devised, and unless there be also a clear intention that the descended estates should not be subject to the payment of the debts. *142 n.*
3. If there be a declaration, express words, or clear manifestation or indication upon the face of the will, that the personal estate is to be discharged from the payment of debts, the Court will not disappoint the intention. *Ibid.*
4. The personal estate of a son on whom lands in mortgage descended, is not liable to the payment of mortgage money. *Ibid.*
5. And the personal estate of a devisee of lands mortgaged by the deviser or his ancestors, is not liable to the payment of the mortgage money. *Page 142 n.*
6. The personal estate of the purchaser of an equity of redemption has been held to be not liable to the mortgages. *Ibid.*
7. Unless the intencion of the purchaser appears to be to make the debt his own. *Ibid.*
8. The distinction appears to depend upon communication with the mortgagee, or some other act done by the party, to make the debt his own. *Ibid.*
9. A mortgage upon a man's estate, not of his contracting, is not considered his debt payable primarily out of his personal estate. *143 n.*
10. On the other hand, a man may make a mortgage debt of his own contracting to be considered payable primarily out of his real estate; as a devise to trustees to sell and pay a mortgage thereon; but it seems that a conveyance upon trust to sell and pay debts generally does not exempt the personal estate. *143 n.*
11. With respect to a devise upon trust for sale to pay debts generally, there is a distinction on this point as against different characters, legatee of personal estate, and next of kin, it having been held, that the personal estate, where specifically bequeathed, is exempted from the payment of a mortgage debt; but that the personal estate is subject to mortgages where it goes to the executor without any particular powers or appropriations. *Ibid.*
12. In order to exempt the personal estate, the Judge must be satisfied, on looking at the whole will, that it was the testator's intention to exempt the personal estate, and, circumstances, *dehors* the will, ought not to be called in to assist the explanation; the Judge will not look out of the will as to

the state of the testator's affairs.

Page 143 n.

See *LIS PENDENS*.

ATTORNEY AND CLIENT.

1. *A.* having purchased land, left the investigation of the title to *C.* and *D.*, solicitors in partnership. They advised that a good title could be made, and the purchase was thereupon completed. *D.*, the solicitor, was a trustee in the conveyance to bar dower. *A.* dies, and his devisee sells the property to *D.*, one of the solicitors. *D.* did not object to the title until eight months afterwards. In his answer he said he had no recollection of the title. Held, that a solicitor who has been employed to advise on a title to property could not, on purchasing it himself from his client, set up an objection to the title which he did not think of any importance when advising his principal. Decree for specific performance. *Beever v. Simpson.* 69

2. An attorney having been employed to purchase an estate for his client, entered into a contract in his own name, the fee was conveyed to him, and he insisted upon holding it in his own right. Held, that the attorney was a trustee for the client; and decreed, that the attorney convey to his client, the Plaintiff, upon payment of the purchase-money. *Lees v. Nuttall.* 282

3. A solicitor having purchased a property of his client at an under value, the client eighteen years afterwards brought his bill to set aside the sale. The Court was of opinion that a solicitor dealing with his client was bound to show that he had given his client the price which he would have advised him to accept from another person; but the Plaintiff having

failed to show that he was not in a situation during the time which had elapsed to seek relief, the Court dismissed the bill, but without costs. Mere evidence of embarrassment is not sufficient.

Semble, Had the Plaintiff applied to the Court in a reasonable time, or had the Court been satisfied by evidence of his total inability to take proceedings in this Court before, he would have had relief. *Champion v. Rigby.* Page 421
See *MORTGAGE*, 7.

B.

BANK ANNUITIES.

A testator having given four *per cent.* stock, and he not having as much at the time of his death, by reason of the reduction of interest in one of the four *per cent.* stocks to three and a half *per cent.* by act of parliament. Held, that the legatee was entitled to his legacy in the existing four *per cents.* *Banks v. Sladen.* 407

BANKRUPT.

1. A bankrupt had been made a party defendant in a suit after his bankruptcy. He set up a claim on his answer to a life interest under the settlement on his marriage; yet it being manifest that he had no interest, all his estate having passed to his assignee, who was before the Court, the Court dismissed the bill as against the bankrupt, with costs. *Bennett v. Low.* 238
2. A commission was issued against two partners; subsequently a commission was issued against one of them, and three other persons. This latter commission was then superseded as to the partner who was included in the first commis-

sion, without prejudice as to the other three bankrupts. The assignees under the second commission sold an estate belonging to one of the three partners: the purchaser objected that the second commission was altogether void; but the Court held, that it was a good commission, not only in equity but at law, and made a decree for specific performance. *Burlton v. Wall.* Page 113

3. The 16th section of the bankrupt act was made for the purpose of giving validity to a commission of bankrupt, which in its origin was not valid. 118
4. The Master of the Rolls has no authority to reverse the Vice Chancellor's order to supersede a commission of bankrupt, or to rehear the order. *Burlton v. Wall.* *Ibid.*

See FINES FOR RENEWAL.
HUSBAND AND WIFE.
INSOLVENT DEBTORS.
MORTGAGE, 3. 5.

BEQUESTS.
See ASSETS.
WILL.

BONDED WAREHOUSES.
See INTERPLEADER.

BOUNDARIES.

1. Where a Plaintiff shows a title to some land, and a confusion of boundaries, he is entitled to a commission or an issue; the Court may direct either. In this case a commission was directed. *Godfrey v. Littell.* 221
2. Freehold and copyhold being intermixed, the Court directed a commission. *Norris v. Le Neve.* 234
3. A commission ordered to distinguish freehold from allotments under an inclosure. *Millard v. Panconst.* 235
4. And to distinguish freehold from

customary. *Robinson v. Hodgson.* Page 235

5. To distinguish freehold lands. *Attorney General v. Bowyer.* 286
6. To distinguish manors. *Clifton v. Gwyntne.* *Ibid.*

C.

CESTUI QUE TRUST.
See FINES FOR RENEWAL.
MORTGAGE, 3.

CHARITIES.

1. *A.* by her will gave 7000*l.* to the governors of *Christ's Hospital*, upon trust for certain specific charities, and to pay certain annuities, and to apply 40*l.* *per annum* to the scholars of *Christ's Hospital*. In case the governors refused to accept the trust, then the 7000*l.* was given to the trustees of the Rev. *William Hetherington's* charity, for the like trusts, except as to the 40*l.* *per annum*, which was to be applied to the purposes of the latter charity. The testatrix also gave 2000*l.* to the University of *Oxford*. The governors and trustees refused to accept these trusts, and the legacy of 40*l.* *per annum*. The University also refused to accept the legacy of 2000*l.* : Held, that whenever a charitable legacy, from whatever cause, fails, the Crown has a right to interfere, and that the legacies of 2000*l.* and 40*l.* *per annum* must be applied to such charitable purposes as the Crown shall direct : Held, that as to the 7000*l.*, a reference be made to the Master to appoint new trustees. The bill dismissed as against the governors, trustees, and University. *Denyer v. Druce.* 32
2. Legacies were given to the "*Guernsey Hospital*;" there was not in fact any hospital of that name, and the Court refused to ap-

ply the funds. *Simon v. Barber.*

Page 14

3. Where a charitable object fails, from whatever cause, the Crown has a right to interfere. *Ibid.*
4. The Crown must signify the charitable purpose to which the fund shall be applied. *Ibid.*
5. The Court orders a legacy to a foreign charity to be paid over, as it will not administer the funds of a foreign charity. Legacies to charities in *Ireland* are administered by commissioners there, under an act of the Irish parliament. *Collyer v. Burnett.* 79
6. The statute of mortmain does not extend to money given to Scotch charities to be invested in land in *Scotland.* 80 n.
7. The mayor, bailiffs, and burgesses of *Berwick-upon-Tweed*, in consideration of 50*l.* left by will, for erecting and maintaining a house of correction there, by feoffment dated 28th May, 1653, conveyed the moiety of a property there to the churchwardens and overseers, for the erecting and maintaining a house of correction within the borough, and for maintaining and ordering the poor therein for ever, and all other sturdy and idle persons coming and being therein; and for the getting them and every of them to work. By another feoffment of the same date, in consideration of 350*l.* owing by them to the poor, the mayor, &c. conveyed the other moiety and some other lands for the like purposes. Held, that this town never having at this time raised poor rates under the statute of *Elizabeth*, these were gifts in aid of the poor rates.

As to part of the lands, the rents of which had been duly applied down to the eighteenth century, when their application ceased for the use of the poor, and was

wholly carried to the corporate chest; the Court being satisfied upon the evidence that it was intended to be comprised in the second feoffment, declared it to be a part of the charity, and that the rents should be accounted for from 1823, when the same were claimed for the use of the poor; and the rents thereof were also declared to be applicable in aid of the poor rates.

The costs of the relators to be taxed as between party and party, and paid by the mayor, bailiffs, and burgesses. The extra costs of the relators to come out of the fund. *Attorney General v. Corporation of Berwick-upon-Tweed.* Page 239

8. A legal fee cannot be created in individuals without the use of the word "heirs," or some equivalent expression; but with respect to charitable trusts, the Court does not adhere to form. 246
9. Gifts in aid of the poor are not generally gifts in aid of the poor rates. *Ibid.*
10. Testator directed the produce of his real and personal estate to be invested. Part of the personalty consisted of mortgages and securities on real and leasehold estates; part consisted of a sum of money due on a covenant to sell a freehold house. Testator gave various legacies out of the mixed fund to charities. He also gave the residue to charities. Held, void as to the mortgages and money due on the sale of the freehold. The charities to abate *pro rata* in respect of the legacies and residue. *Harrison v. Harrison.* 273

See CONDITION.

CHILDREN.

Who take by that description. 273.

425

See POWER.

CHRIST'S HOSPITAL.

See CONDITION.

CODICIL.

See WILL.

COMMISSION.

See ACCOUNTS.

BOUNDARIES.

CONDITION.

In 1724 a testator gave 400*l.* per annum to the governors of *Christ's Hospital*, upon condition that they received four boys or girls annually, to be nominated by the relators.

The governors received the income and the nominees until 1827, when they passed a resolution that they would no longer receive them.

Held, that this was a gift upon condition, and having accepted the gift they were bound to the condition. *Attorney General v. Christ's Hospital.* Page 393

See VENDOR AND PURCHASER, 7.

CONFIRMATION.

1. A merchant, being abroad, empowers certain persons in this country to receive moneys, adjust claims, and do some other acts. Money being wanted by the firm here, of which he was a partner, these attorneys deposit the deeds with the Hope Insurance Company to secure 12,000*l.*, and covenant that he should execute the mortgage; this 12,000*l.* was also secured by the bonds of sureties in sums corresponding to the shares of the partners. Held, that the power of attorney was not a sufficient authority; but, the merchant on his return to this country, having written a letter to the Hope Company requesting the loan of 6000*l.* "to be secured on my *Essex* property, which you now hold, in addition to the 12,000*l.* already ad-

vanced," and professing his readiness to execute the mortgage deed: Held, that this was a confirmation of the security. Some of the parties having paid the amount of the sums secured by them: Held, that they had a lien on the property. One of those sureties being a partner: Held, that the sum paid by him was subjected to the partnership accounts.

- Munnings v. Bury.* Page 147
2. Held, that acquiescence in a transaction cannot be maintained, unless it be shown that the party whose interests are affected knew not only the facts which affected his interest, but the legal effect of those facts upon that interest. *Cockerell v. Cholmeley.* Page 435
3. Acquiescence does not cure a defect, where the party was at the time wholly ignorant of rights which were in him. 445

CONSIDERATION.

1. Inadequate consideration is no ground for relief in equity in respect to the sale of a property in mortgage to the mortgagee, although the mortgagor be in distress, if no advantage be taken. 31
2. But it is a ground for making void a sale of a reversion, and there it is incumbent on the purchaser to prove the value. 368

See POWER.

REVERSIONS.

CONSTRUCTION.

Circumstances *dehors*, a will ought not to be called in. 143 n.

CONTRIBUTION.

See LIS PENDENS.

COPYHOLDS.

In two manors in *Durham* there is no custom for surrendering to the uses of the will, but the tenant divests himself of the legal estate, and by surrender vests it in a trust.

tee, who subscribes a memorandum or defeazance that the surrender is to the uses of the surrenderor's will. In this case the father and maternal grandfather of the testator *R. N.*, being both copyholders, had respectively caused their copyhold tenements to be surrendered to the other, who had subscribed the usual defeazance. The legal estate in both descended to the testator. But with regard to the tenements in the manor of *Houghton*, they were devised by the father of the testator to trustees, to the intent that his widow might receive an annuity thereout, and subject thereto, to the testator *R. N.* in fee. The widow being alive at the time the testator *R. N.* made his will and died; it was held, the copyholds in the manor of *Houghton* passed by his will.

With respect to the tenements which were in the other manor, the testator's maternal grandfather, who had the beneficial interest in them, devised them unto trustees, upon trust for the testator *R. N.* Held, that there being nothing to separate the legal and equitable interest, the equitable interest had merged in the legal estate in the testator, and could not be devised by him according to the custom of the manor: Held, that his widow was entitled to free bench, and the heirs, subject thereto, to the inheritance; but they taking benefits under the will were bound to elect. *Nicholson v. Nicholson*.

Page 319

See CUSTOMARY ESTATES.

HEIR AT LAW, 6.

COPYRIGHT.

1. The Court does not give an ac-

count of the sale of a pirated copy of a work, unless it grants an injunction. The injunction is the ground of the account. That injunction may be granted at the hearing. The account is consequential.

The Court will not grant an injunction after a considerable lapse of time; and where a piracy was only of a small part of a work, and was of itself a matter of calculation, the Court was of opinion that to interfere would not be a fair exercise of its jurisdiction. *Baily v. Taylor*. Page 295

2. With respect to a work of calculations, if there were previously similar calculations, yet if they were calculated by the author, although calculated by another person before him, they are a work of computation as to which he is to be protected by the statute.

299 n.

3. A work published in 1811, the Court would not prohibit by injunction in 1829.

COSTS.

1. If a Plaintiff insists upon what he is not entitled to, whilst the Defendant has been ready to perform the agreement really entered into, the Defendant is entitled to costs. *Bass v. Clively*. 80

2. It is frequently the practice to give costs against a plaintiff who has a decree, when the costs have been incurred by his fault. 84

3. Costs were refused to an heir at law, he having conveyed his interest to two of his sisters. *Barton v. Croxall*. 164

4. *Quære*, if a town clerk, party to a bill of discovery, is entitled to his costs. 249 (a)

5. The provisional assignee is ent

(a) In the case here referred to, the decree has been drawn up, and costs are not given to the town clerk.

bled to his costs from the mortgagee in a suit for foreclosure by the mortgagee, who will be allowed to add them to the principal and interest due to him on the mortgage. *Peake v. Gibbon.* Page 505

See BANKRUPT.

CHARITIES, 7.

EQUITABLE RELIEF, 4.

EXECUTORS, 7. 9.

FRAUD.

HEIR AT LAW, 8.

HUSBAND AND WIFE, 2.

INSOLVENT DEBTORS.

TRUSTEES, 6.

COUNSEL, CONSENT BY, IN COURT.

1. Where such consent has been signed by counsel on both sides, it lies on the party impeaching it, to disprove it. 43
2. In the absence of evidence, the Court will conclude that counsel had authority; for it is not to be presumed that counsel would enter into an agreement without authority. 44

CROSS REMAINDERS.

An estate being devised in remainder to daughters in tail, and in default of issue, then over: Held, that nothing went over until there were a general failure of issue of all the daughters, and consequently that there were cross remainders between them. 464, 465

CROWN, RIGHTS OF.

See CHARITIES, 1. 3, 4.

CUSTOMARY ESTATES.

A lord of a customary manor *for life only*, purchased a tenement in the manor in fee by conveyance and surrender. The mode of transmission of lands in the manor was by conveyance and surrender. The lord died, leaving only a daughter. The manor, by the

settlement under which he held it for life, was limited in default of sons in remainder to his brother, and the manor went over to the brother. Held, that the usual mode of passing estates being by common law conveyance, the freehold was in the tenant. Held, that on the death of the lord, the tenement descended to his daughter, the heiress at law; she would require admittance to perfect her title. *Bingham v. Woodgate.*

Page 183

See HEIR AT LAW, 6.

D.

DEBTS.

See ASSETS.

DEED.

See EQUITY.

DEVISE.

See ASSETS.

DISTRESS.

See FRAUD.

E.

ELECTION.

See ANNUITY.

COPYHOLDS.

EQUITABLE RELIEF.

1. A testator having devised lands to be conveyed to his son for life, with remainder to the second and other younger sons of his son in tail, and the Court, being satisfied from the whole will that the testator intended that after the death of his son, the first son of that son should have an estate tail conveyed to

M m

him, decreed accordingly. *Langston v. Pole.* Page 119

2. A Court of Equity has no jurisdiction to correct a mistake in an instrument, where the parties have proceeded upon error in point of law. 443

3. The only jurisdiction a Court of Equity has for correcting mistakes in deeds, is where the drawer of the instrument, the mere agent and instrument who has prepared the deed, has mistaken the intention of the parties to the deed. *Ibid.*

4. *A.* agreed to lend *B.* 600*l.* navy 5 per cent. stock. He sold the stock for 522*l.*, which he paid to *B.* A bond is drawn by an unprofessional man to repay "the sum of 522*l.* (being the produce of 600*l.* stock, 5 per cent. navy or such other sum as would replace the stock) with lawful interest." A sum equal to the dividends was paid half-yearly; but *B.*, on discharging the bond, refused to transfer the stocks and would only pay the money received by her: to this *A.* objected; but at length received it, and gave up the bond, remonstrating on the injustice of the proceedings, but being told at the same time that the money would only be paid in discharge of the bond: Held, that *A.* had no relief in equity; he should not have received the money, unless the party paying it had agreed that the remedy should remain open; but the costs were refused. *Barnham v. Munn.* 84

See ATTORNEY AND CLIENT.

CONSIDERATION.

FRAUD.

MORTGAGE.

SPECIFIC PERFORMANCE.

EVIDENCE.

The deposition of an admission of a residuary legatee and executrix

is good evidence, it being against her own interest. *Neathway v. Ham.* Page 316

See COUNSEL.

EXCEPTIONS.

1. Cannot be taken to a report of good title, on the ground that the heir at law was not a party to the suit. 3
2. The eighth of Lord *Lyndhurst's* orders applies only to answers to exceptions. 433

EXECUTORS AND ADMINISTRATORS.

1. Executors having contracted to purchase land, sell out stock, and deposit the produce at a banker's when the purchase seems to be near completion. They are not liable to make good the money if the bankers fail. *France v. Woods.* 172
2. One of several executors receiving part of the personal estate, which he hands to his co-executor, who wastes the estates, still remains personally liable; but because he happens to be executor, he is not liable for monies which he received for the purchase of a freehold estate of the testator, and which he received as the agent of another person empowered by the will to sell it, to whom he had paid over the amount, but is perfectly justified in so paying it over. *Davis v. Spurling.* 199
3. If one executor receive part of the personal estate, and afterwards hand it over to a co-executor, who wastes the property so handed over to him, the former is personally liable for the abuse of trust by the other executor. 210
4. Executors depositing money belonging to the estate with the same persons as the testator intrusted with his money in his lifetime, although they are not bank-

- ers, are not liable for a loss sustained by their bankruptcy. *Dorchester v. Effingham*. Page 279
5. An executor is not liable, unless he acts from corrupt motives or *crassa negligentia*. 281
6. It is not the practice of the Court for executors themselves to apply to pay money into court. *Ibid*.
7. A person appointed with another executor, and who disclaims, but does some acts as a friend of the family, is not to be considered to have acted as an executor, and a bill against him as such would be dismissed with costs. *Dover v. Everard*. 376
8. An administrator having claimed his debt before the Master, that is sufficient to entitle him to retain it. *Winter v. Hicks*. 475
9. Administrator entitled to his costs out of the produce of the sale of a real estate, his intestate having been a trader. 475
- See ANNUITY.
- FEME COVERT.
- HUSBAND AND WIFE.
- LEGACY.

EXECUTORY BEQUEST.

1. Gift to a wife, and if she make no disposition of it, then over: Held, an absolute gift. *Bourn v. Gibbs*. 414
2. In some older cases the question seems to have been influenced by the fact, whether the first taker had or had not exercised an absolute power over the property, or shown an intention to make it absolutely his own. 415, 416. n.

See ACCUMULATIONS.

WILL.

EXTINGUISHMENT.

Takes place only when both estates have the same duration; and where a lord for life purchased customary estates in the manor in fee, it was not an extin-

guishment, but it was a suspension of the seignory during the life of the lord, and this seignory would necessarily survive to the remainder-man on the death of the lord, when also the customary tenement would descend to the heir of the lord. Page 198

See CUSTOMARY ESTATES.

F.

FAMILY ARRANGEMENTS.

The Court does not attend to points in family arrangements which it requires in other agreements. 294

FEME COVERT.

1. Stock was settled on marriage to the separate use of the intended wife, and afterwards as she should appoint. She assigned her life interest to two persons for certain purposes, and appointed the capital to the same purposes. Decreed, that the trustees transfer the stock accordingly. *Lynn v. Ashton*. 328
2. Bequest to a married woman to her separate use; the Court would not order payment into her hands, but ordered the legacy to be carried to her account, with liberty to apply. *Owen v. Lys*. 404
- See HUSBAND AND WIFE.
- WILL, 3. 20.

FINE.

See HUSBAND AND WIFE.

FINES FOR RENEWAL.

T. H. by his will devised certain freehold and leasehold property to a trustee, upon trust to permit his son *T. E. H.* to receive the rents during his life, subject to the payment of rents and performance of

M m 2

the covenants reserved and contained by and in the present or future leases, whereby the leasehold premises were or should be held; and also all taxes, fines, and expenses attending the same, remainder upon trust for the sons of *T. E. H.* in fee as tenants in common. The tenant for life became bankrupt, and afterwards died; his assignees recovered from a mortgagee of the bankrupt a sum of 2000*l.* which he had received as rents under a mortgage of this property, which he took with a knowledge of the insolvency of the bankrupt. The sons of *T. E. H.* brought their bill to have the fines paid out of the rents. Held, that these rents were to be considered as received subsequent to the bankruptcy, and as such liable to the fines for renewal. *Hulks v. Barrow.* Page 264

FOREIGN CHARITIES.

See CHARITIES, 5.

FRAUD.

1. *J. S. M.* was entitled to the dividends of 4300*l.* for life, with a power to appoint by any deed or writing the principal after his death, and in default of appointment the principal was vested in his next of kin. *J. S. M.* being in prison for debt, and in great distress, is prevailed upon by *H. C.* to enter into an agreement for sale of the principal after his death, in consideration of 1000*l.* and other sums therein stated to have been previously lent and advanced to him by *H. C.*

By a subsequent deed, in consideration of 1854*l.* therein stated to be due from *J. S. M.* to *H. C.*, and of 1000*l.* paid by *J. L. M.* and others, *J. S. M.* by the direction of *H. C.* appointed that the principal should, on his death, be

transferred to *J. L. M.* and others, with a proviso that they should assign the same to *H. C.* on payment of 1000*l.* and interest, and all further advances. The 1854*l.* or any part of it, had not, in fact, been advanced by *H. C.* Held, that this was a clear fraud: Held, that the appointment was well executed; that the next of kin of *J. S. M.* had no claim; that *H. C.* was a trustee for the personal representatives of *J. S. M.* for the excess beyond the money received by *J. S. M.*; that *H. C.* should pay costs. *Mellor v. Minet.* Page 481

2. Accounts having been settled and a release executed, fraud or surprise must be shown in order to impugn either. 199

See PRACTICE, 25.

FREE BENCH.

See COPYHOLDS.

G.

GIFT.

See PRACTICE, 9.

GRANDCHILDREN.

See WILL.

GUARDIANS.

1. The father of illegitimate children has no authority to appoint guardians for them by will. *Mills v. Roberts.* 476
2. The Court will appoint guardians. *Ibid.*

H.

HEIR AT LAW.

1. *A.*, by will, directed his debts to

be paid out of his personal estate, and the deficiency to be made up out of his real estate. The heir at law must be a party. The will cannot be declared to be well proved in his absence. *Fordham v. Rolfe.* Page 1

2. Where the heir at law, by reason of his being out of the jurisdiction, is not before the Court, the Court will merely decree the trusts of the will to be carried into execution; and if the decree be that the will be established, the heir at law being absent would not be bound.

3 n.

3. But it is not a good exception to a report of good title that the heir at law is not a party. 3

4. The heir at law should be made Defendant, and not Co-plaintiff, when any deed, will, &c. is to be proved against him. *Ibid.*

5. A constructive trust is not within the statute 6 G. 4. c. 74. enabling infant trustees to convey. 4

6. A person who was entitled to a copyhold on the death of his mother, having covenanted to surrender it to trustees for the benefit of his creditors, died, without having been admitted, leaving an infant his heir at law. Held, that the legal estate vested in the infant, and that she was not within the statute 6 G. 4. c. 74.

10, 11. n.

7. An heir at law, having in his answer admitted the due execution of the will, and the sanity of the testator at the time of making it, the Court will infer that he had made every necessary enquiry in order to obtain information before he made the admission, and the Court will not allow a succeeding heir to dispute the will, nor will the Court direct an issue *devisavit vel non.* *Livesay v. Harding.* 463

8. The heir at law is entitled to his costs in a creditor's suit from the

Plaintiff, who may be reimbursed out of the fund in Court without prejudice to the costs of the administrator. *Winter v. Hicks.*

Page 475

See ASSETS.

COSTS.

CUSTOMARY ESTATES.

EXTINGUISHMENT.

HERITABLE BOND.

1. A. being entitled to a Scotch heritable bond, devised it with other property; the heritable bond does not pass, but descends to the heir at law; it is immaterial that there is also a personal obligation. The debt still retains its real character as the *jus nobilium.* *Jerningham v. Herbert.* 103

2. An heritable debt is not changed into moveable by an accessory moveable security. 112 n.

HUSBAND AND WIFE.

1. The wife of a bankrupt was entitled under the will of her grandmother to a moiety of certain public funds on the death of her mother. Her husband became bankrupt; then the wife died; then the mother died. On a bill filed by the assignees of the bankrupt against the executrix of the grandmother and the administrator of the wife of the bankrupt: Held, that the bankrupt having survived his wife, the assignees became beneficially entitled. *Harper v. Ravenhill.* 144

2. On a marriage, the father of the wife purchased 1000*l.* consols, and the same was vested in trustees to pay the dividends to the wife for her life, and then trusts were declared for the children of the marriage, under which the Court had decreed in a former suit, that the only child of the marriage, a daughter, took a vested interest. This daughter married J. M., and

died in the lifetime of the mother, leaving *J. M.* her surviving. *J. M.* did not take out administration to the effects of his deceased wife, and afterwards died. Held, that his executors were entitled to the 1000*l.* consols, and that the representatives of the wife were not entitled. One of *J. M.*'s executors, who was a Defendant, having colluded with the other Defendant, the personal representative of the wife, the Court gave costs against both of them. *Platt v. M'Dougall.*

Page 390

3. Land purchased by the husband, subject to a mortgage, with the money of a half sister of the wife, was, on the marriage, settled on the husband and wife for their lives, and the life of the survivor of them, remainder to the heirs of the body of the wife, remainder to the right heirs of the husband. The husband having died, the widow and eldest son sold and conveyed part of the lands, and the son alone levied a fine. Many years afterwards, the eldest son being dead, without issue, the widow also levied a fine to the use of the purchaser. Held, that the property was not within the spirit of the statute 11 *H. 7. c. 20.*, and that the Plaintiffs, who were the issue of the second son, were barred by the fine, with proclamations, of the widow. *Watkins v. Lewis.* 447

See SPECIFIC PERFORMANCE, 1.

I.

INDULGENCE.

See VENDOR AND PURCHASER, 7.

INFANT HEIR.

See TRUSTEES, 1, 2.

INJUNCTION.

See COPYRIGHT.

INSOLVENT DEBTORS.

1. A person who had been twice discharged by the Court for the Relief of Insolvent Debtors, died possessed of considerable property: Held, that this Court could administer the fund; that first the creditors subsequent to the second insolvency should be paid, then those after the first insolvency, and lastly those before the first insolvency. *Barton v. Tattersall.* Page 378
2. The statute of limitations does not affect the creditors of an insolvent mentioned in his schedule for the debts therein stated, in respect of the time elapsed since his discharge. 390
3. A testator gave a dwelling-house and a piece of land to trustees, upon trust to receive the rents and apply the same for the board, lodging, maintenance, support, and benefit of the testator's son, as as they should think proper for his life; and the application thereof for the benefit of the son was to be at the entire discretion of the trustees, and the son was not to have the power in any way to sell, mortgage, or anticipate the rents. The son took the benefit of the act for the relief of insolvent debtors; the Plaintiffs were his assignees. The Court decreed a conveyance to the Plaintiffs. Trustees to retain their costs as between solicitor and client. *Green v. Spicer.* 396

INTERPLEADER.

Warehousemen being private agents, and not holding goods as the possessors of a public bonded warehouse, cannot maintain a bill of interpleader. But where goods are deposited in a public bonded

warehouse, a bill of interpleader may be maintained against the contending claimants. *Cooper v. De Tastet.* Page 177

IRELAND.

See CHARITIES, 5.

ISSUE.

See BOUNDARIES.

L.

LEASEHOLD.

See FINES FOR RENEWAL.

LEGACY.

In 1752, a testator gave a legacy to a boy on his attaining twenty-one. The legatee went to America at an early age, and had not been since heard of. On a bill by the personal representatives of the boy, the Court directed an enquiry whether he attained the age of twenty-one years, and whether he was living or dead, with liberty to report special circumstances. *Hudson v. Twining.* 315

See ANNUITY.

CHARITY.

LEGATEE.

1. A legacy having been given to a legatee in a name which she had for many years assumed, the Court directed an enquiry who was the person meant. *Neathway v. Ham.* 26
2. When the identity of a legatee is doubted, the Court directs an enquiry. 32

See EVIDENCE.

FEME COVERT.

LIEN.

See CONFIRMATION.

See MORTGAGE.

VENDOR AND PURCHASER, 1.
3.

LIS PENDENS.

A testator gave lands to A. in strict settlement, and a manor to B. in strict settlement; on his death a creditor's bill was brought for the administration of assets; and it appearing that the testator owed a debt on mortgage, and some specialties, the Master was directed to ascertain what proportion the properties contained in the several devises ought to bear, and to raise the amount by sale or mortgage. The Master sold the manor and lands. The title to the lands was completed, and the purchase money paid, but no good title could be made to the manor. The report was confirmed in 1798. B. continued in the possession of the manor, and never paid the contribution; and in 1824 he and his eldest son having suffered a recovery, sold it to J. J. F. In 1825, A. died, and in the same year his eldest son, tenant in tail, filed his bill against B., and his eldest son, and the purchaser. Decreed, that this was a purchase *pendente lite*; and the contribution reported by the Master to be paid from the estate devised to B., with interest and costs, was ordered to be raised by sale and mortgage, and paid to the Plaintiff. *Kinsman v. Kinsman.* Page 399

M.

MAINTENANCE.

1. The Court will not give past maintenance for infants to a father, but it will give future maintenance
M m 4

when the father is not of ability to maintain them. *Simon v. Barber.*

Page 22

2. The Court directed interest to be paid on legacies to two natural children of the testator, who were infants, from his death, and the Master was directed to enquire what would be fit to be allowed for their maintenance and education for the time passed since the death of the testator, and the time to come. *Mills v. Roberts.* 480

See TRUSTEES, 8.

MANOR.

See CUSTOMARY ESTATES.

EXTINGUISHMENT.

MARRIAGE.

1. Marriage with a sister of a deceased wife only voidable, and not questionable, after her death. 388
2. The Court will direct an enquiry as to a marriage in *Scotland.* *Ibid.*

MERCHANTS (CUSTOM OF).

See ACCOUNTS.

MERGER.

See COPYHOLDS.

CUSTOMARY ESTATES.

MISTAKE.

See EQUITABLE RELIEF.

POWER, 1.

WILL, 5. 8.

MORTGAGE.

1. Inadequate consideration is no ground for relief in equity in respect to the sale to the mortgagee of the property in mortgage, although the mortgagor be in distress, if no advantage be taken of it. 31
2. Devise of lands subject to 1000*l.* to be raised for the testator's daughters, to an annuity of 37*l.* 10*s.* to his widow, and to all such incumbrances as might happen to be

thereon, does not exempt the personal estate from the payment of a mortgage thereon. The personal estate is the primary fund for the payment of debts. *Phillips v. Parker.* Page 136

3. A *cestui que trust* for life of leaseholds, subject to fines for renewal, mortgaged his interest, and the mortgagee entered into possession and received the rents. The *cestui que trust* afterwards became bankrupt. His assignees commenced an action against the mortgagee for the rents, and at the trial the jury found that he took the mortgage with a knowledge of the insolvency of the *cestui que trust*, and found a verdict for the Plaintiffs for the amount of the rents received by him. The *cestui que trusts* in remainder filed their bill against the mortgagee and the assignees, praying that they might be compelled to pay all fines; but the Court was of opinion that, after the action at law, the mortgagee was not answerable for the fines for renewal. *Hulks v. Barrow.* 264
4. Twenty years are not an absolute bar to a mortgagee. It is merely a case of presumption, which may be rebutted. *Stewart v. Nicholls* 307
5. A mortgage was made in 1790, and the mortgagor became bankrupt in 1794; there were several prior mortgages. The Court would not, in 1829, presume this debt satisfied. 312
6. The Court will not give relief, if there has been an adverse possessor for twenty years. 313
7. An attorney having received money for his client, and being owed on mortgage from another person the sum of 3000*l.*, wrote to his client that he had that mortgage in his hands, and having received the like amount for the

client, he undertook, when there-
unto required, to execute a trans-
fer of the same. Held, that this
was not mere proposal; and al-
though there was no express ac-
ceptance, yet there being no re-
fusal of the security, the client
was entitled to all such interest as
the attorney had therein. *Palmer*
v. Scott. Page 488

See ASSETS.

CHARITIES.

CONFIRMATION.

SPECIFIC PERFORMANCE, 2.

VENDOR AND PURCHASER, 7.

MORTMAIN.

Gift by will to a charity of money
due on a covenant to sell a free-
hold house, is within the statute of
mortmain, and void. 273

See CHARITIES.

N.

NAME.

See LEGATEE.

NAVY AGENTS.

See ACCOUNTS.

NEXT OF KIN.

See FRAUD.

NOTICE.

1. Notice to an agent is notice to
his principal, but it must be in the
character of agent. 176
2. A suit pending is notice to a pur-
chaser. 399

P.

PARTIES.

1. A. by will directed his debts to
be paid out of his personal estate,
and the deficiency to be made up

out of his real estate; and subject
thereto he devised his copyhold
messuages. Testator died; a cre-
ditor's bill was then filed, but
neither the heir at law nor any
personal representative were par-
ties; in fact, the will had not been
proved; there was no personal
estate. Held, that administration,
cum test annexo, must be taken out,
and that the administrator and
heir at law must be parties. Bill
to be so amended. *Fordham v.*
Rolfe. Page 1

2. A testator, by his will, in 1752,
gave a legacy to a boy on his
attaining twenty-one. The boy
went to America, and his legacy
had been handed to the Defend-
ants, in whose hands it had accu-
mulated. On a bill by the personal
representatives, it was suggested
that the representatives of the
original testator ought to have
been parties, but the Court did
not think they were necessary
parties. *Hudson v. Twining.*

315

3. A party having purchased land,
and signified at the time, that he
made the purchase on behalf of
the trustee in his marriage settle-
ment, who had money vested in him
to be laid out in land, and a bill
being filed against the purchaser
for specific performance, the Court
would not allow the cause to pro-
ceed until the trustee were made a
party, and the cause stood over
for that purpose. *Wynniat v.*
Lindo. 512

See EXECUTORS, 6.

HEIR AT LAW, 2, 3, 4.

PARTITION.

1. A testator devised his moiety of
an estate, and then made partition
with his co-tenant; on this, the
estate was conveyed to a trustee
as to one part, to the use of the
testator in fee; and a mortgage

term, created by the co-tenant in his moiety, was assigned to attend the inheritance. Held, that this was not a revocation of the will.

Barton v. Croxall. Page 164

2. A mere partition does not revoke a will. 171

PARTNERSHIP.

1. Mines are for many purposes partnership property. They are liable to the debts of the partnership, and debts to the partnership; and notwithstanding the bankruptcy of a partner indebted to the partnership, the accounts are to be taken beyond the time of the bankruptcy, up to the time of the sale. The debts of the partnership are first to be satisfied, and out of the bankrupt's share repayment is to be made to the partnership of what is due to it from him. *Fereday v. Wightwick.* 250

2. The sixteenth section of the Bankrupt Act was made for the purpose of giving validity to a commission of bankrupt, which in its origin was not valid, by enabling the Lord Chancellor to supersede the commission as to one partner. *Burlton v. Wall.* 118

3. All property, whether real or personal, is subject to a sale on a dissolution of the partnership. 261

4. Property acquired by a partnership is subject to all the debts of the partnership, and to the debts of one partner to the other partners in respect of the partnership. 261

5. Payment by a client to one of two partners after the partnership has been dissolved, is a good payment, unless there be notice to the debtors of the partnership that partnership debts are to be paid in a particular manner. If the debtor permits one of such partners to receive monies due to him,

in the confidence that those monies when received will be a satisfaction of the partnership debt, the retainer of those monies is equivalent to an actual payment. *Pritchard v. Draper.* Page 332

6. The Plaintiff and Defendant held some powder mills on a lease, which would expire in 1831. The Plaintiff filed his bill for a dissolution of the partnership: it was objected by the Defendant that the partnership must last during the lease; but the Court held the partnership dissolved from the time stated in a notice given by the Plaintiff to the Defendant. *Alcock v. Taylor.* 506

See ACCOUNTS.

BANKRUPT, 2.

CONFIRMATION.

PRACTICE, 1, 2.

PAYMENT.

See EQUITABLE RELIEF, 4.

PERSONAL ESTATE.

See ASSETS.

PERSONAL REPRESENTATIVES.

Those words mean executors and administrators. *Saberton v. Skeils.*

383

POOR RATES.

See CHARITIES.

POWER.

1. Sir H.E., by his will, devised his lands to trustees, to the use of his eldest son for life, *sans waste*, and in strict settlement, with remainders over, under which the Defendant ultimately became tenant in tail in possession, and the testator gave his trustees a power of sale, with the consent of the tenant for life. The lands were sold for a price fixed exclusive of the timber, which was valued, and the

amount of the valuation paid to the tenant for life. By the conveyances the surviving trustees in consideration of the price fixed, conveyed the land to the purchaser; and the tenant for life, in consideration of the value of the timber, which had then been determined, conveyed the timber to the purchaser. Held, that this was a bad execution of the power in a court of equity. The Plaintiff having endeavoured to show that there was in the letters which passed prior to the conveyance, an agreement for the sale of the estate and timber, without any stipulation that the price of the latter should be paid to the tenant for life, pressed the Court to aid the execution of the power; but the Court, being of opinion that there was not such an agreement, and that it was understood by the parties that the tenant for life was to receive the value of the timber, and that the drawer of the instrument had not mistaken the intentions of the parties, refused to aid the execution of the power.

Cockerell v. Cholmeley. Page 435

2. A testator directed trustees to sell his real and personal estate, and pay the amount of the produce to his wife, trusting that she would provide for his family, and at her decease that she would give and bequeath the same to her children by him, as she should appoint. The widow by will made an appointment to five of her seven daughters. Held, that the appointment was void, all the children being entitled to the benefit of the fund: Held, that the widow could only execute the power by will, and that only such of her children took an interest as survived her, and consequently that the representative of a child who died before her could not

take any part of the fund. *Walsh v. Wallinger.* Page 425

3. Powers generally require certain formalities in the mode of execution; and if there be a valuable consideration, the Court will aid the defective execution of a power. 442

4. Where a person has a general power of appointment, and he duly executes it, but the Court subsequently deprives the appointee of the benefit of it, on the ground of fraud upon the appointor, yet the Court will not declare the appointment void in favour of the persons entitled in remainder, in default of appointment, but will decree that the appointee is a trustee for the personal representatives of the appointor. *Mellor v. Minet.* 481

See FRAUD.

WILL, 3.

POWER OF ATTORNEY.

See CONFIRMATION.

PRACTICE.

1. Although a decree in a suit for the administration of the assets of a testator direct that all accounts be taken, some of the Masters will not take the accounts of a partnership unless especially directed so to do. *Woolley v. Gordon.* 11
2. But the Court will direct an enquiry whether there was a partnership, and if the fact be found in the affirmative, that the accounts be taken. 13
3. And the Court will direct this on the petition of a party after the usual decree has been made, under special circumstances. *Ibid.*
4. The father of infants had maintained and educated them since the death of their mother, when they became entitled to a sum of money in this Court. The father petitioned for a reference to the

Master on the subject of maintenance and education of the children, and for an allowance as well for the time past as in future; but the Court refused to make any reference to the Master with respect to the maintenance of the infants in the time past, but made the usual reference with respect to their future maintenance out of the funds, in case the father himself was not of ability to maintain them. *Simon v. Barber*.

Page 22

5. But, except in the case of a father, the Court will direct past and future maintenance. 480

6. The Court refused to allow a petition to be amended by substituting another person for the petitioners, who, on the hearing of the petition, appeared to have no title. *St. John v. Stirling*. 23

7. When there is a doubt on the identity of a legatee, the Court will direct an enquiry at the expense of the person requiring it. *Denyer v. Druce*. 32

8. A bill having been filed by the Plaintiff on behalf of himself and others of the crew of a *South Sea* whaler, for their shares of the profits, and *no case* for equitable relief having been made *as to the others* of the crew, the bill as to them was dismissed. *Spittal v. Smith*. 45

9. Two ladies borrowed 10,000*l.* of *Coutts* and Co. on the bond of themselves and *G. N.*; they gave a bond for 12,000*l.* of the same date to *G. N.* A question having arisen, whether the bond was for indemnity, or a gift for services or otherwise, the Court would not decide it, but directed issues to be tried before a jury. *Earl of Winchelsea v. Garretty*. 63

10. The Court will, on the petition of an assignee of the reversion, order the accountant general not to

transfer stock, although the petition has not been served on the assignor. *Salmon v.* Page 74

11. The Master of the Rolls has no authority to reverse the Vice Chancellor's order to supersede a commission of bankrupt, or to rehear the order. *Burlton v. Wall*. 118

12. The Plaintiff is entitled under a prayer for general relief to such remedy as the statement of his case entitles him to. *Topham v. Constantine*. 185

13. Accounts having been settled, and a release executed, in order to avoid the latter, and obtain an account in this Court, the Plaintiff must establish either fraud or surprise. *Davis v. Spurling*. 199

14. In order to induce the Court to give a decree to surcharge and falsify, some *one* mistake must be shown. *Ibid*.

15. If an error be detected, and settled before the institution of a suit, it is not a foundation for a decree to surcharge and falsify. *Ibid*.

16. Bill seeking relief on the ground of fraud or surprise, Plaintiff failing to establish either, dismissed with costs. *Ibid*.

17. In case parties choose to satisfy themselves with a personal obligation, the Court, on a bill for specific performance, will not give more. *Brough v. Oddy*. 221

18. It is not the practice for executors to apply to pay money into Court. *Lord Dorchester v. The Earl of Effingham*. 281

19. A supplemental bill cannot be filed to an original bill, in respect of which subpoenas have not been served. *Stewart v. Nicholls*. 307

20. Where a purchaser under the Court has made a profit, the Court will not make absolute the order nisi for confirming the purchase, unless the profit be brought into Court. 343

21. The Court will not, at the hearing, dismiss a subsequent incumbrancer, although he undertook to join in any conveyance he might be called upon to execute. He ought to have disclaimed on his answer, and not having done so he must remain a party. *M'Nab v. Mensal.* Page 375

22. The Master, to whom exceptions to answer were referred, made his report, certifying the answer to be insufficient, and allowed the Defendant one month's further time to put in his answer; the Plaintiff three weeks afterwards amended his bill, and obtained an order that the Defendant should answer the amendments at the same time that he answered the exceptions. The Defendant obtained an order, *ex parte*, for six weeks' time to answer both. On the petition of the Plaintiff to discharge the last-mentioned order, the petition was dismissed, and it was held, that the eighth of Lord *Lyndhurst's* orders applies only to the answer to exceptions. *Fosbrooke v. Balguy.* 433

23. It has been decided several times, that a case may be within the words of a statute, and yet not within the spirit of it; and the Court will decide according to the spirit of the statute. 460

24. An administrator having claimed his debt before the Master, that is sufficient to entitle him to retain it. 475

25. Executors having filed a bill in a case of fraud, and the Court being of opinion that they had duly filed their bill, although they had not properly stated their prayer, yet under the prayer for general relief they were held to be entitled to such relief as the case made by the bill required. 487

See ACCOUNTS.

COSTS.

See COUNSEL.

EXECUTORS.

FEME COVERT.

INSOLVENT.

LEGACY.

SPECIFIC PERFORMANCE.

TRUSTEES.

VENDOR AND PURCHASER.

PROPOSAL.

See AGREEMENT.

R.

REAL ESTATE.

See ASSETS.

RECOMMENDATION.

See WILL, 8.

RECOVERY.

See HUSBAND AND WIFE.

RENEWAL.

See FINES FOR RENEWAL.

RESIDUE.

The Court will construe a residuary gift more favourably than a general legacy, to make it vest in order to avoid an intestacy. Page 367

REVERSIONS.

1. A person having a reversionary interest expectant upon the death of *R. without issue*, sold the same. Many years afterwards a bill was filed to set aside the sale on the ground of inadequacy of consideration: Held, that the Court will not enter into the value of property on such a contingency. But it appearing that the treaty was entered into on the basis of considering the contingency to be half the value of the reversion, the Court directed an enquiry of the real value, without reference

to the contingency and directed that that contingency, should be rated at one half the value. *Baker v. Bent.* Page 368

2. It is incumbent on the purchaser of a reversion to prove the value.

374

3. A bill was filed in 1826 to make void a sale of a reversion effected in 1805. It was proved that the price was inadequate. It was held, that in a suit to make void the sale of a reversion, it was not necessary to prove fraud or surprise; inadequacy of consideration being alone sufficient, by the decided cases, to authorize the Court to make void the sale and treat the purchaser of a reversion only as a mortgagee; that is, that the vendor, paying the purchaser his principal, interest, and costs, is entitled to a reconveyance. *Hilliard v. Gambel.* 375

See PRACTICE, 10.

S.

SCOTLAND.

See CHARITIES.

HERITABLE BOND.

SEIGNORY.

See CUSTOMARY ESTATES.

EXTINGUISHMENT.

SHIPPING.

See ACCOUNTS.

SPECIFIC BEQUEST.

See ASSETS.

SPECIFIC PERFORMANCE.

1. A husband being prosecuted and found guilty, at the quarter sessions, of an assault upon his wife, the Court recommended an accommodation of the disputes and differences between them. The counsel of the parties signed a

memorandum of an agreement that the husband should allow the wife an annuity of 50*l.*, and the Court, adverting to the arrangement, passed sentence upon the Defendant; imposing only a nominal fine upon him. It was proved that the Defendant's attorney stated publicly in Court that the Defendant had come into the agreement, and that the Defendant was in Court when the arrangement was entered into. The Defendant by his answer denied that he ever consented to it, and on his part there were depositions that to some extent supported it: Held, that it was not incumbent on the Plaintiffs to prove that the Defendant did assent to an agreement entered into by counsel, but on the Defendant to disprove it: Held also, that the weight of the evidence being that the Defendant did not dissent, a Court will conclude a counsel had authority: Held, that the plaintiffs were entitled to a decree for a specific performance with costs. *Elworthy v. Bird.* Page 38

2. *A.* agrees to lend *B.* 8000*l.* on mortgage of leasehold houses, and not to call for the title of the lessor, and advanced 600*l.* in part. He then called for the lessor's title, and filed a bill for specific performance or sale of the property, to repay him the 600*l.* and interest: Held, that he was not entitled to the title, but only to a specific performance of the contract as proved; and that if a Plaintiff insists upon what he is not entitled to, whilst the Defendant has been ready, to perform the agreement really entered into, the Defendant is entitled to costs. *Bass v. Clivley.* 80

3. The Plaintiff having parted with title deeds on which she had a lien, to enable her debtor to raise

a sum of money on annuity, the Defendant, by memorandum in writing, undertook to pay that annuity to the Plaintiff in case it should not be paid by the grantor. The annuity fell into arrear, and the Plaintiff paid it. On a bill for specific performance and adequate security: Held, that the Plaintiff having taken this personal security, a court of equity would not interfere. Bill dismissed. *Brough v. Oddy.* Page 215

4. Children entered into an agreement for the distribution of their father's property on his death, and which was to be taken to him for his approbation. He died before the agreement was submitted to him. The Court refused to carry it into effect. *Beastall v. Swain.* 288

See PARTIES.

PRACTICE.

WILL, 8.

STAMPS.

Letters of administration under which a Plaintiff makes title must be stamped *ad valorem*, but the Court will allow a cause to stand over for a week for that purpose. *Harper v. Ravenhill.* 144

STATUTE OF LIMITATIONS.

See INSOLVENT.

MORTGAGE.

SURETIES.

See CONFIRMATION.

T.

TENANT IN TAIL.

See HUSBAND AND WIFE, 3.

LIS PENDENS.

TIMBER.

See POWER.

TITHES.

Wood cut from hedges is titheable although not used on the farm. *White v. Smith.* Page 306

TRUSTEES.

1. A. contracted to sell a freehold estate to B., and by his will gave the purchase-money and the interest to become due in the meantime to trustees for certain purposes; and if the contract should not be completed, he devised the freehold estates to the trustees, upon trust to sell the same and apply the purchase-money to the like purposes. A. died, leaving a son his heir at law, who died, leaving an only daughter his heiress at law an infant. The Court held, that she was not a trustee within the act 6 G. 4. c. 74., and dismissed a petition that the infant might be ordered to convey. *In re Moody.* 4

2. The heir at law of a person entitled to the reversion of a copyhold, having covenanted to surrender it, and died without having been admitted, leaving an infant his customary heir: Held, that the infant was not within the statute. 10 n.

3. Where a sole trustee in a will, to whom a term of 2000 years was devised, dies in the testator's lifetime, the Court will refer it to the Master to appoint a new trustee, and to settle and approve of a demise for the like term. *Devey v. Peace.* 77

4. Only one trustee having been appointed by the will, the Master can only name *one* instead of him. 78

5. Trustees are not affected by notice to their agent, which he did not receive in that character. Trustees having contracted to purchase land, sell out stock, and deposit the produce at a banker's

when the purchase seems to be near completion; they are not liable to make good the money if the bankers fail. *France v. Woods.*

Page 172

6. The Master of the Rolls, in a suit by the assignees of a bankrupt against the trustee of a fund contingent on the event of the bankrupt surviving his mother, which event happened after the bankruptcy, having made a decree in favour of the Plaintiffs, would not make the trustee pay costs, he having acted in ignorance. *Knight v. Martin.* 237

7. In a suit for the appointment of new trustees, there being no power in the deed for that purpose, the Court refused to direct such a power to be inserted in the new deed. *Southwell v. Ward.* 314

8. The testator having directed his two trustees to apply a moiety of rents, or such part as they or he should in their or his discretion see fit, in the maintenance and education, or advancement in life, of his younger children during the life of his wife, and one of the trustees having died, the Court would not interfere with the discretion to be exercised by the surviving trustee. *Livesey v. Harding.* 460

9. Trustees of stock signed a power of attorney to sell it out, and the proceeds were received from the broker by one of the trustees, who afterwards became insolvent. Decreed, that the other trustees account for and pay the amount. *Marriott v. Kinnerley.* 470

10. A trustee is liable if he incautiously does an act by which he places the trust property in the hands of persons who abuse it. *Ibid.*

11. A trustee is not chargeable for acts done before he accepts or acts in the trusts. *Ibid.*

12. If there be a communication be-

tween a trustee, and a person for whose benefit a trust is created, then the trustee is liable to him; but he is only not so when there, is not that communication.

Page 474, 475

See ATTORNEY AND CLIENT.

EXECUTORS.

FEME COVERT.

TRUSTS.

See HEIR AT LAW.

U.

USURY.

Annuity for years, originating in an agreement for a loan, and producing more than a return of the principal and five per cent. interest is usurious. *Fereday v. Wightwick.* 250

V.

VENDOR AND PURCHASER.

1. A vendor who has taken as a security for part of the purchase-money the bond of the vendees, and a mortgage of part of the property sold, cannot, on the bankruptcy of the vendees, establish a lien on the entire estate. *Capper v. Spottiswoode.* 21

2. *A.* having deposited leases with *B.*, to secure monies borrowed at different times from 1805 to 1813, in the latter year signed an agreement giving up all his interest to the mortgagee. It was proved that the sum due to the mortgagee was a very inadequate consideration. Held, that *A.* was not en-

titled to relief in equity; and bill dismissed. *Purdie v. Millett.*

Page 28

3. Where an estate has been sold to a person who has since died, the Court will direct an account to be taken of the personal estate, and decree that the vendor shall have a lien on the land for so much as the personal estate will not extend to pay. *Topham v. Constantine.* 135
4. A purchaser in this Court having resold with a profit before his purchase was confirmed, the person to whom he has sold is to be considered as a substituted purchaser under the Court, and must pay the additional purchase-money into Court for the benefit of the parties to the suit. *Hodder v. Ruffin.* 341
5. An estate having been sold, in which the petitioners were interested, it was represented to them that a good title could not be made, and they were induced to give a brief to counsel to consent to the purchaser being discharged. They subsequently discovered circumstances which led them to conclude they had been deceived, and that in fact a good title could be made; and thereupon petitioned the Court that the order might be discharged. The Court discharged the order, giving the purchaser his costs, and referred it to the Master to enquire whether a good title could be made. The solicitor for the petitioner to have the conduct of the enquiry. *Butter v. Ommarney.* 344
6. A purchaser having given notice that he would not complete the purchase, and the vendors having delayed to file their bill for a specific performance more than twelve months after that notice, the Court held that it was an unwarrantable delay, and dismissed the bill with costs. *Watson v. Reed.* 381

7. The plaintiff made a mortgage to the first husband of the Defendant, who, after that husband's death, lent the Plaintiff the further sum of 200*l.* Subsequently she bought the estate for an additional 400*l.* Soon afterwards she granted a lease to the Plaintiff, and signed an agreement indorsed on the lease that the Plaintiff might repurchase within five years, paying the rent as it became due. The rent was not regularly paid; in some instances not until distresses were levied. Held, that this was not a case of forfeiture, but of particular indulgence. From all the evidence, the Court was of opinion that the transactions were not contemporaneous; and the Court held, that the terms not having been fulfilled, the bill must be dismissed with costs. *Davies v. Thomas.* Page 416
8. A purchaser entitled to title deeds having paid his purchase-money into Court, the Court will not order the money to be divided, and the deeds to remain in the hands of the Master until the completion of the purchase of all the other lots. *Hobson v. Neale.* 446
9. Houses and lands were devised to trustees in fee upon trust for sale; the surviving trustee appointed the plaintiffs his executors, but did not make any devise which comprehended trust estates. On the death of the surviving trustee, his executors sold the property in lots. The Defendant became the purchaser of four of them; and, just as his purchase was about to be completed, it was discovered that the legal estate was in an infant, the heir at law of the surviving trustee. The Plaintiffs thereupon presented a petition to the Court, under the statute 6 G. 4., that the infant might be directed to convey. The Plaintiffs' solicitor

apprised the Defendant's solicitors of this proceeding, to which they made no objection. Twelve months elapsed before the Master's report could be obtained, and a short time previously the Defendant commenced an action for the deposit, and subsequently recovered it; in the mean time the dilapidations of the houses purchased had increased. Held, that although the defendant might have retired from the contract on the discovery of the defect in the vendor's title; yet as he did not do so, and acquiesced in the proceedings which were necessary to clothe the Plaintiffs with the legal title, and there being no evidence that reasonable diligence was not used in the Master's office, the plaintiffs were entitled to a decree for specific performance. Held, that the Defendant was entitled to the amount of the dilapidations. Held, that the Defendant was entitled to costs. Held, that the Plaintiffs were only entitled to interest from the date of the decree, but that the vendors were entitled to the rents up to that date. *Hoggart and Others v. Scott.* Page 501

10. The Defendant contracted to sell an inn to the Plaintiff, and in the treaty represented to him that the agreement under which the tenant in possession held it was a void agreement, and that he would give the Plaintiff possession at *Michaelmas* following. He had, in fact, given the tenant notice to quit at that time. The tenant did not quit. These representations were proved by witnesses. Held, that the Plaintiff was entitled to be released from the agreement, or that he might, at his election, perform it and have compensation. He elected to have performance, and it was decreed to him with com-

pensation and costs. *Besant v. Richards.* Page 509

See ATTORNEY AND CLIENT.

BANKRUPTCY, 2.

LIS PENDENS.

PARTIES, 3.

POWER, 1.

PRACTICE, 10. 20.

REVERSIONS.

W.

WAIVER.

See ANNUITY.

WIDOW OF A FREEMAN OF LONDON.

- A bequest to the widow of the testator, in lieu of dower, does not preclude her from her claim on the personal estate as the widow of a freeman of London. *Harrison v. Harrison.* 276

WILL.

1. A., by each of two several codicils to his will, directed his just debts to be paid, and in particular a debt of 12*l.*; by the one of them he gave 100*l.* to a charity, and by the other he gave 200*l.* to the same charity. Held, that the legacies were not accumulative, and that the latter legacy was only a substitution of the former. The gifts in this case were to the *Guernsey Hospital*; there was not any hospital by that name, and therefore the Court would not apply the funds. *Simon v. Barber.* Page 14
2. A testator gave to his wife an annuity, and 100*l.* a year for each of his three children during their minorities, and from and after the decease or marriage of his wife, then the 300*l.* to be divided amongst his said children in like manner as his other effects; and subject thereto, he bequeathed his leasehold and personalty unto his three

children; and the survivors and survivor of them. One of them died under twenty-one. Held, that he took a vested interest at the time of the death of the testator. *Bass v. Russell.* Page 18

3. A., a married woman, having, by virtue of her marriage settlement, power to appoint her personalty, and a freehold, to such person as she should direct, with remainder to a trustee, to sell and distribute amongst her next of kin, gave, devised, and bequeathed to her husband the freehold, by the description of her two fields and house; likewise the remainder of her personalty, and *all she might be possessed of* at the time of her death, after certain previous bequests and her just debts were discharged; and appointed him and another executors. Held, that the husband took only an estate for life, and the next of kin were entitled to the monies to arise by a sale of the reversion. *Monk v. Mawdsley.* 24

4. A testator, in the early part of his will, gave all his property amongst his four illegitimate children, a boy and three girls, subject to such regulations and legacies as he should thereafter mention. He then says—"As the whole of this estate is to be equally divided amongst the before mentioned four children, or the survivor of them, a regular division must be made of the estate when each comes of age, or is married; and the share of such person is not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy. When the girls, or any one of them, come of age, or get married, I hereby direct that their shares may be so settled on themselves during their lives, and on their children, in equal propor-

tions, after their deaths, that it will not be in the power of the husband, if so inclined, to injure either his wife or children." The testator then proceeds,—“Should it be the will of Almighty God to take one or more of these children unto himself, the share or shares of such children, dying without issue, are to be divided amongst the survivors; but in case of issue, these children are to inherit the share of their parents amongst them equally; and in case they die without issue, it is to return for the benefit of the survivors of those four children or their families. Upon the reversion of and sum to the public stock, the issue of a deceased child is to have the share which its parent would have had.” Held, that the boy, on attaining twenty-one, took an absolute interest in his share. Held, that the daughters took for life, with remainder to their issue. Held, that on either daughter dying without issue, her share would go to the survivors of the four children, in like manner as their original shares. *Jackson v. Forbes.* Page 88

5. J. L., by his will, devised his manors to trustees upon trust to convey the same to his son, J. H. L., for life, with remainder to trustees to preserve contingent remainders, with remainder to the *second* and other younger sons of J. H. L. in tail male. There was no limitation to the *first* son of J. H. L.; but the declaration of the trusts of the term contained a provision to raise money for the daughters on failure of issue male of the body of J. H. L. The will also provided, that in case J. H. L. should have any children other than and besides an eldest or only son, then, that money might be raised by him for the portion of younger

sons or daughters. Held, that the true construction of the will was, that the *first* son should have an estate tail male in reversion after the death of his father. *Langston v. Pole.* Page 119

6. *R. N.*, by his will, gave all his personal estate to *R. F.* and *I. F.* that that is to say (he then enumerates several particulars), in trust for the following purposes; that the same be not liable or resorted to for the payment of mortgages or bond debts, until the legacies, debts, and charges thereafter mentioned should be satisfied; and as soon as that could be effected, the same was to be resorted to in relief of his real estate. The testator then gave several legacies to his wife and children, and bequeathed the residue, after the respective charges thereby made thereon, to his eldest son. Held, that the residue, as well as the enumerated articles, were subject to the charges in the will mentioned. *Nicholas v. Nicholas.*

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7. Bequest of a sum of 50*l.* to each of the three children of *A.* Now *A.* had five children. Held, that each child was entitled to 50*l.* *Harrison v. Harrison.* 273

8. An old gentleman who had several children and grandchildren, had made and executed two wills, and disputes having arisen in the family about them, some of the oldest members of it entered into an agreement amongst themselves for a division of his real and personal estate. This was to be taken the next day to the testator for his approbation, and he was to be desired to cancel both wills. In the course of the night the testator died. The personal property was divided according to the agreement, and a deed of covenant was executed with respect to the appropriation of the

real estate, which deed the party whose rights under the last will would be much diminished by it, understood to be a deed for carrying the first agreement into execution; but, in fact, the two instruments differed in many particulars. Held, that the first agreement was only a recommendation to the testator, and could not be carried into effect in equity: Held, the second agreement or deed differing from the first agreement, whilst it was understood to contain corresponding provisions, could not be carried into effect. No costs given, the Defendant having secluded the testator from the other members of the family. *Beastall v. Swain.* Page 288

9. A testator having directed his executors to pay the interest of the residue to a woman during her life, and after her decease to divide the residue amongst the next of kin: Held, the next of kin at the testator's death were the persons entitled. *Collisam v. Sams.* 346
10. A testatrix directed that the interest of 6000*l.* should be paid to her son during his life, and at his death one half of the stock to go to the son's *eldest male child living at the death of the testatrix*; the other 3000*l.* to be divided in equal shares between his other children lawfully begotten; but should the son of the testatrix die without *leaving* issue, then she gave the 6000*l.* over to her two other children during their lives, and at their deaths to their issue; and if either of them should die without leaving issue, then to the grandchildren which should remain. By a codicil, the testatrix willed, that upon the death of each one of her children who had issue, that her grandchildren's share be settled upon them, to enjoy the interest during their lives, and afterwards

- to revert to their children. Held, that in respect to the gift to the *eldest male child* of the son "living at my death," the limitation over by the codicil of the 3000*l.* given to him by the will, is within the rules of law: Held, that the gift of the 3000*l.* to the other children of the testatrix's son, being general, extended to all the children he might have, either before or after her death; and that the limitation by the codicil over to their children was therefore void. *Arnold v. Congreve.* Page 347
11. An estate cannot be limited after an estate to unborn children. 358
 12. Where a limitation is to grandchildren generally, it extends not only to those *in esse* at the death of the testatrix, but those born afterwards, and therefore any limitation to their children is not within the rules of law. 359
 13. Where a codicil fails by reason of its giving an interest too remote, the will is not affected by the codicil, and the interest of the legatees rest upon the construction of the will only. 359
 14. And where grandchildren by a will take an absolute interest, and a codicil made for the purpose of letting in great grandchildren having failed, the interest given to the grandchildren by the will will not be displaced by the codicil. *Ibid.*
 15. A testatrix, by her will, directed that the interest of the residue of her estate should be divided between her four sisters during their natural lives, and on their deaths the interest to be applied in the maintenance or education, or accumulate for the benefit, of the children of each of the sisters so dying, until they should severally attain the age of twenty-two, and upon their attaining that age they were to become entitled to their mother's share of the principal; and in case of the death of either of them under that age leaving issue, such issue to be entitled to their respective parents' share, at such time as the parents would have been entitled thereto if living: Held, that the gift to the children of the sisters was too remote, and they being void, the subsequent gifts were also void, and the shares as they drop in belonged to the next of kin. *Vawdrey v. Geddes.* Page 361
 16. It has been held, that the Court will construe a residuary gift more favourably than a general legacy, to make it vest in order to prevent an intestacy. 367
 17. A legacy cannot be held to be vested where it is given over, if the legatee do not attain a certain age, although maintenance be given; the gift over repels all presumption of vesting. *Ibid.*
 18. As to freehold, a different rule prevails. *Ibid.*
 19. *A.*, by his will, in October 1822, gave 12,500*l.* and 10,000*l.* 4*l.* per cent. Bank Annuities. There were at that time two stocks at 4*l.* per cent. and the testator had moneys in each; one of those stocks was, prior to his death, reduced to 3*l.* 10*s.* per cent. Held, that the legatees were entitled to have the respective amounts in the other 4*l.* per cent. annuities still existing. *Banks v. Sladen.* 407
 20. A testator having given by his will legacies to his several daughters, directed that 1000*l.* of the legacy to each of them should be invested in the name of trustees and the daughter entitled, in trust to pay her the interest, for which her receipt should be sufficient, and it should not be subject to the debts of her husband, and the principal should, after her death, pass and be subject to any

- will or disposition she might under her hand and seal make thereof, and for want thereof should go to her personal representatives. The plaintiff married in succession two of the daughters. Held, that the words "personal representatives" mean executors and administrators; that the wife took an absolute interest, and that the husband on her death became absolutely entitled. The marriage with the second sister having been solemnized in *Scotland*, an enquiry was directed whether it had actually taken place. *Saberton v. Skeels*. Page 383
21. Gift to a wife; and if she make no disposition of it, then over. Held, an absolute gift. *Bourn v. Gibbs*. 414
22. Bequest of 10,000*l.* provided the legatee attain twenty-one. In a subsequent part of the will the testator appointed guardians, whom he requested to attend particularly to the education and well being of the legatee, and see that she was properly and virtuously brought up and educated. Held, that the interest of the legacy was applicable to the maintenance of the legatee; but the principal was contingent. *Mills v. Roberts*. 476
23. A legatee being a natural child, the testator has no power to appoint guardians for her, but the persons named in the will, being well known to the Court as proper persons, they were appointed guardians, without a reference to the Master. *Ibid*.
24. Bequest of residue upon trust to pay the dividends to three persons during their lives and the life of the survivor of them, and after their deaths to transfer the principal to *A.* and *B.*; and if either of them died before his share of the trust-money became payable, without leaving issue of his body lawfully begotten, then his share should go to the survivor, when his original share would become payable. *A.* died in the lifetime of the testator; *B.* survived the testator and the persons to whom the life interests were given. Held, that *B.* was entitled to one moiety as his original share, and to the other moiety as having survived *A.*, who died without leaving issue of his body. *Humphreys v. Howes and others*. Page 497
25. Bequest of residue to trustees, upon trust for testatrix's brother's children and *M.*'s children, to be equally divided between them; the dividends to be laid out by the trustees as should be most advantageous for them, but no part of the dividends to go for their board or education, but the same to accumulate for them until they come to the age of twenty-one years. *M.* was herself one of the children of the testatrix's brother. Held, that the children born at the death of the testatrix took vested interests: Held, that the testatrix did not mean to include *M.* as one of the children of her brother. *Bull v. Johns*. 513
26. The testator directed his personality to be invested for the sole use and maintenance of his daughter until she arrived at twenty-one; and when she attained twenty-one, the remainder to be paid to the daughter. She died under twenty-one. Held, a vested interest. *Rose v. Sowerby*. 376
27. An heir at law, in his answer to a bill to establish a will, admitted that the will was well executed, and the sanity of the testator. The heir died, and the bill was revived against his brother, who disputed the execution of the will,

and the sanity of the testator.
Held, that the Court would not
allow him to do so. *Livesay v.*
Harding. Page 460

28. A devise to daughters and the
heirs of their bodies, as tenants in
common ; and if only one, to such
only daughter and the heirs of her
body, with remainder, in default
of issue, to the testator's right
heirs : Held, that there were cross
remainders between the daughters.

Ibid.

See ADEMPATION.

ANNUITY.

CHARITIES.

CHILDREN.

CONDITION:

COPYHOLDS.

CROSS REMAINDERS.

EXECUTORY INTERESTS.

HEIR AT LAW, 7.

HUSBAND AND WIFE, 1.

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